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In The Supreme Court Of The United States

OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

CHAUFFERS, TEAMSTERS AND HELPERS,
et al.,
Intervenors.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Volume Three - Appendix to Writ of Certiorari

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ently than were other employees in their category.

Noting too, that I have found above that the Respondents did not violate the Act by its actual, as opposed to its threatened, contracting polices, I find that the Respondents did not violate Section 8(a)(3) and (1) of the Act by using those contracting practices to reduce the earnings of Teddy Ray Hayes, Harden Branscome, Gene Hester, Robert Gwyn Wyatt and John Danner.

D. Events Occurring After Tyson's July 18 Takeover

1. Refusals to bargain concerning drivers-yardmen unit—facts

(a) Bargaining between March - July

On March 24, 1989, following an election in Case 11-RC-5571, the seven above-identified Teamster lo-

cals, herein collectively the Unions, were jointly certified as bargaining representatives for Holly Farms employees in the following unit:

> All driver employees and yardmen at the Employer's Monroe and Wilkesboro, North Carolina; Glen Allen, Harrisonburg, and Temperanceville, Virginia; and Center and Seguin, Texas, facilities; excluding all office clerical employees, and guards and supervisors as defined in the Act.[194]

Holly Farms and the Unions met in about 12 contract negotiating sessions between April 11 and June. The parties are in agreement that these negotiations were conducted in good

[194] On March 9, 10 and 11, when the election in Case 11-RC-5571 was conducted, there were about 299 drivers in the unit. On September 12, when the General Counsel and Union assert that the Respondents withdrew recognition from the unit, the Respondents employed 209 unit drivers and about 45 yardmen—35 in the eastern division and approximately 10 in the western division.

faith and that at the time of the July 18 stock purchase by Tyson,[195] the parties were continuing to attempt to reach agreement. During these negotiations, attorney Jesse S. Hogg served as chief spokesman for the Company while Bruce D. Blevins, secretary-treasurer of Teamsters Local 391, filled that role for the Union.

At Hogg's suggestion, the parties agreed to reschedule negotiating sessions that had been set for July 10-12 to gain additional time in which to clarify Holly Farms' status and bargaining position as Tyson had successfully bid for Holly Farms' stock and was about to assume control. On

[195] Tyson learned on July 14 that its purchase bid for the purchase for Holly Farms' stock would be successful.

July 18, Hogg contacted Blevins and advised that he would continue as Company spokesman and the parties set August 8, 9 and 10 negotiating dates.

Charles Clark Irwin[196] testified, that 5 years earlier, he had met with Pete Lovette, then-head of the Holly Farms' transportation group and who later became that Company's treasurer. As a result of this meeting, Irwin learned that Holly Farms was losing money, a situation which continued into 1989. Tyson's initial bid for Holly Farms was made around mid-October 1988 and while the acqui-

[196] Irwin, with Tyson since 1978, was Tyson's group vice-president, distribution and commodity purchasing, based at Tyson's headquarters in Springdale, Arkansas. At the time of the hearing, Irwin was responsible for Tyson's transportation and warehousing functions and for all ingredient and commodity purchasing that went into the production of feed at Tyson Foods' 13 feed mills.

sition process continued, in response to an inquiry by Don Tyson, Tyson's board chairman and chief executive officer, as to how Holly Farms' transportation division might be integrated with Tyson and for a projection of the economic result, Irwin and Mike McNeese, Tyson's director of transportation, prepared a projected operating plan, dated January 24, which broadly outlined how the two transportation divisions might be merged.[197]

On July 14 and 15, key Holly Farms management personnel and the representatives of Tyson management group from Springdale, Arkansas, met in

[197] Tyson's acquisition of Holly Farms also included various Holly Farms subsidiaries which, although substantial enterprises, are not germane to this proceeding.

Atlanta, Georgia, for a general introductory meeting and to exchange ideas. During this meeting, the status of Holly Farms' collective-bargaining negotiations with the Unions were discussed as was a document describing Tyson's long haul transportation corporate philosophy and goals, prepared by Irwin 2 weeks before.[198]

No decisions were taken at the Atlanta meeting.

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[198] This documented statement of Tyson's general philosophy for owning and operating its fleet first presented Holly Farms' executives with ideas later put into effect when the Holly Farms transportation division was incorporated into the Tyson transportation system. Briefly, for a number of specified reasons, it was Tyson's purpose to move between 25 to 35 percent of its volume in its own trucks. The Holly Farms group first also learned of the Tyson fleet manager dispatching concept, which will be described below.

(b) <u>The August 8 negotiating session</u>

The Respondents and the Unions met as scheduled on August 8 at a motel in Greensboro, North Carolina. The events of this meeting, jointly attended by 20 Company and Unions' representatives, are not in dispute. Hogg continued to serve as the Respondents' spokesman while Blevins filled that role for the Unions. Hogg announced that the Tyson representatives, at negotiations for the first time, were present for informational purposes. Hopefully, they could answer questions as to the decisions that were to be presented and implemented.

Hogg told the Unions' representatives that Holly Farms was not fully-owned by Tyson Foods, Inc., which had

purchased the entire Company and had taken full control over the Holly Farms' operations. Tyson, having examined the situation, was going to make some changes. The Seguin, Texas, plant, part of Holly Farms western division, was going to be converted from a fresh poultry plant, to be blended into the Tyson operation as a fast food or institutional-type plant. The 14 drivers, members of the Unions' bargaining unit, who were based at that plant would be given the opportunity to work for Tyson. Hogg explained that those drivers would not be employed by Holly Farms but would be dispatched from a central point, not yet established, in northeast Texas.

Hogg announced that the Holly Farms' plant at Center, Texas, the other segment of Holly Farms western division, would continue to be a pressed poultry plant, but would be put into the Tyson operation. Of the 25 Holly Farms drivers domiciled at Center, 18 or 19 would be given the opportunity of working for Tyson and the remaining drivers, in excess of these 18 or 19, would be laid off as Holly Farms drivers, subject to recall as determined during further negotiations.

Both the Seguin and Center drivers would be dispatched from a central point to be established in northeast Texas. Neither group would be required to change their residences. As under Holly Farms, these drivers

could take home their trucks if they lived in the area or, at their option, could leave their trucks at their respective plants.

Hogg announced that Tyson was not going to integrate the eastern operations into Tyson although, if Tyson had so desired, it was Hogg's position that they could. Instead, Tyson was going to operate these eastern operations as the Holly Farms Foods Fresh Retail Division. Hogg emphasized that the Holly Farms' brand name was famous and one which Tyson desired to maintain. However, Tyson did intend to make certain changes with regard to the eastern operation; it was going to reduce the number of drivers and tractors operating in the east. He told the Unions that Tyson

was going to reduce the number of tractors by 47 and was going to reduce the number of eastern drivers by 71.

Blevins, for the Unions, objected to the reduction of eastern division drivers, accusing the Respondents of wanting to have more of its product hauled by outside carriers and less hauled by Company drivers.

Hogg informed the Unions that the facilities to be affected by those reductions would be at Wilkesboro, Monroe and Temperanceville. The Company would add additional tractors to the other Virginia facilities. Hogg also advised the Unions that the Company was withdrawing the proposed 4 percent pay increase during a 1 year contract that Holly Farms had placed

on the table during the June 22 negotiating session and presented a revised proposal that pay remain unchanged during a 1 year agreement. The Unions protested then and at subsequent meetings that the Respondents were making those proposals to pressure and bring hardship on employees who had elected to be represented by the seven Teamster locals.

The parties continued to negotiate contract proposals for the remainder of that session.[199]

(c) <u>The August 9 and 10 negotiating sessions</u>

The Respondents' and Unions' representatives met again on August 9 at

[199] Hogg's announcements to the Unions on August 8 followed instructions he had received from Blake Lovette in furtherance of decisions taken during a July 21 meeting of Tyson and Holly Farms executives at Tyson's Springdale general corporate offices.

the same place and spent most of that day discussing contract proposals.[200]

On August 10, the parties met again. Hogg advised the Unions' representatives that the Center, Texas, drivers who, on August 8, he had said would be laid off as Holly Farms' drivers, would be offered employment with Tyson. They no longer would be Holly Farms' drivers, but would receive their dispatches from Arkansas. The remainder of that session was spent negotiating contract terms.

(d) <u>The August 21 negotiating session</u>

On August 21, representatives for the Respondents and Unions conducted

[200] On August 9, Lankford sent a memo to four supervisors summarizing the above changed operating plans for Texas drivers and requesting that such changes be communicated to the affected transportation employees at Center and Seguin.

another contract negotiating session at the same Greensboro location. Hogg and Blevins again served as the principal spokesman. That meeting also was attended for the first time by Victor De La Fuentes, the business agent for Local 657, San Antonio, Texas, which local had jurisdiction over Seguin, Texas. At that meeting, Blevins stated that it was the Unions' position that the Respondents were eroding the unit by their previously-stated intention of merging the Texas division into Tyson's operations and by reducing the work force in the eastern division while giving the freight to outside carriers. He again accused the Respondents of taking those actions in order to pressure unit employees in retaliation

for their union activities. Hogg denied that these measures were retaliatory and advised that he had been in touch with the powers that be and that they were going to have their program in effect no later than by November 1. By that time, the reductions in eastern division drivers and equipment would be in place. Hogg reiterated that Tyson was going to reduce the number of outbound miles for eastern truck drivers to that they would be hauling products within only a 450 mile radius of their respective terminals. These drivers would not be making backhauls or, if any other party made a backhaul, it would only be of Tyson or Holly Farms products. This would save the drivers some delay time at

pickup points, since they no longer would have to wait for backhaul loads.

Blevins stated that this sizeable reduction in the driver force was not acceptable to the Unions. He asked the Company to reconsider its plans, to maintain the driver force as it was and not to take the Texas employees out of the bargaining unit. The Unions reiterated that these actions were unlawful and were being done in retaliation.

During the August 21 meeting, Blevins asked who would be hauling the product from the Center and Seguin terminals if the Company took the Holly Farms' drivers out and put them in the new facility. Hogg replied that, more than likely, this

would be done by drivers formerly employed by Holly Farms and, on occasion, by a Tyson driver who might come through the area.

Answering Blevins' inquiry as to the seniority status of Holly Farms' western division employees who were being put into the Tyson transportation system, Hogg stated that he would not make any commitment. However, Hogg reassured the Unions that such drivers would not be discriminated against and would be treated as were the other Tyson drivers. When Blevins asked how the Tyson drivers were treated, Hogg replied that they were not there to negotiate for Tyson; they were there to negotiate for Holly Farms. When Blevins pointed out that Howard Baird, the Tyson

Foods' vice-president for industrial relations, was present and that he would know how seniority was applied in the Tyson transportation division, Hogg answered that Baird was not there to negotiate, but only to provide information or answer questions that Hogg might have.

(e) The August 22 negotiating session

On August 22, essentially the same parties met again at the Greensboro motel. On that occasion, Hogg advised the Unions that the Company was going to go ahead with its plans to reduce the work force in the east and that, in a couple of days, it would be sending out letters to eastern employees and would be laying off the 71 drivers. The Unions again unsuccessfully asked the Respondents not

to lay off these people because of the asserted unavailability of freight since that freight otherwise would be hauled by outside carriers.

Hogg, however, answered Blevins' question of the day before concerning the Texas drivers' seniority. Hogg assured the Unions that Tyson did recognize the seniority and vacations of the Holly Farms drivers who would be integrated into the Tyson operation, both for long distance drivers and for the shuttle (local) drivers.

During the August 21 and 22 sessions, the Respondents did provide the Unions with requested copies of the Tyson pay and benefits plans and advised what these plans were. The Unions had been told during the August 8 meeting that, when integrating

the Holly Farms drivers into the Tyson transportation system, all drivers would be paid in accordance with the Tyson pay plan.

When Blevins asked what would happen to Holly Farms' yardmen after integration, he was told that the Tyson system did not use yardmen to hook up or to unhook trailers from tractors.

The parties spent the remainder of the August 22 session negotiating contract terms and agreed to schedule additional meetings on September 12 and 13.

However, the Respondents' decisions, announced to the Unions during the August 8 through 10 meetings and further discussed later that month, to the effect that Holly Farms would

only be partially merged into Tyson; that the Holly Farms eastern division would be reduced by 71 drivers and 47 tractors; and that a 450 mile outhaul limit would be applied at Holly Farms east, with an elimination of backhaul, never actually were effectuated. Between the August 21-22 sessions and that scheduled for September 12, the Respondents gradually decided that there would be substantially more backhaul work available than previously had been projected. This revised estimate arose from new information, encapsulated in an Au-

gust 24 memorandum by David Hayes[201] to Blake Lovette.[202]

Accordingly, at a September 11 meeting in Wilkesboro, of senior Tyson executives and those who had been with Holly Farms, a decision was finalized to fully integrate the total Holly Farms transportation division—east and west—into Tyson Transportation because of three flaws in the original plan: (1) it was impossible to predict how many loads from a given facility would be within the 450 mile range and how many would be outside; (2) during the 2 months

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[201] Hayes, vice-president of the Holly Farms' transportation division, as noted, became eastern manager of Tyson Transportation on September 24.

[202] Lovette, who until the takeover had been Holly Farms' president, in August, was president of Tyson's Fresh Retail Division. This title later was changed to vice-president.

that had lapsed, it had become evident that there would be sufficient freight available to make unnecessary the announced reductions in eastern personnel and equipment; (3) and since Tyson already had taken over Holly Farms, it was decided that it was best simply to fully integrate the two operations. Hogg was directed to announce the Respondents' revised position to the Unions at the negotiating session scheduled for the next day.

(f) <u>The September 12 negotiating session</u>

On September 12, as scheduled, the parties met at a different Greensboro motel. The Unions were represented by Blevins and members of their negotiating committee. Hogg; Irwin; Hayes; Howard Baird, Tyson vice-

president and director of industrial relations; Bill Travis, Tyson's director of personnel; and Mike McNeese, in charge of the Tyson transportation system, appeared for the Respondents. As before, Hogg and Blevins served respectively as spokesmen for the Respondents and Union.[203]

Hogg opened the meeting by advising the local Unions that before going further, he had an announcement to make. First, he had some good news for the Unions. The Respondents had made a survey and discovered that there was more backhaul freight available than was previously known.

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[203] The events occurring at the September 12 meeting essentially are undisputed and, as described; synthesize the testimony given by witnesses from each side.

Because of this, the Company was not going to lay off 71 drivers, as initially proposed. However, the Respondents were going to integrate the Holly Farms eastern division drivers, as well as the Texas (western) division drivers into the Tyson transportation department. For all intents and purposes, these drivers would become Tyson drivers and would be paid under the Tyson pay scale.[204] However, they would continue to receive the Holly Farms fringe benefits they then were getting as provided in the merger agreement between Holly Farms

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[204] Under the Tyson pay plan, drivers earned different mileage rates based on their service time with Tyson, on a progression of 0-3 years. The Unions were told that Holly Farms drivers being merged into Tyson would receive credit for their Holly Farms service in tenure of their placement in that progression. As will be discussed, Tyson's payment per mile to its drivers was less than Holly Farms' mileage rate for its eastern drivers.

and Tyson. However, the Holly Farms drivers, after integration, would have the same pay scale as the Tyson transportation drivers. Hogg reiterated that there no longer would be Holly Farms transportation drivers—they all would become Tyson drivers. He declared that Tyson would be sending letters to all Holly Farms drivers, including the 71 eastern drivers previously notified that they were being excessed, announcing their opportunity to work as Tyson drivers.

Blevins asked when the Respondents were going to take these actions. Hogg repled that the Company was going ahead that morning with its plans as put on the table. The Unions then requested a caucus.

After caucusing for approximately 20 minutes, Blevins advised the Respondents' representatives that the Unions had serious disagreement with their proposed plans and requested answers to certain questions. Blevins asked Hogg who had made the decision to integrate the entire Holly Farms transportation division into the Tyson transportation system. Hogg replied that he did not know, not having been there, but did not feel that Blevins would get this information. In response to Blevins' question as to when the decision had been made, Hogg stated that he did not feel that Blevins was entitled to that information but that the decision had been made between the time of their last meeting on August 22

and the present September 12 session. When Blevins asked the reason for the decision, Hogg advised that the Company wanted to have more of its freight hauled by outside carriers and wanted to be able to fill up the empty miles with backhauls using Tyson drivers, including those to be integrated into Tyson Transportation. The Unions asked for any documents used or material data related to the making of these decisions. Hogg stated that he would take this request under advisement but, in his opinion, Blevins was not entitled to this information and would not get it.

Blevins also asked Hogg for a copy of the referred-to merger agreement between Holly Farms and Tyson. Hogg

again told the Unions that he did not think that they were entitled to this and might not get it. As of the hearing dates, the Unions had not received a copy of the merger agreement, although as will be discussed, a relevant provision from that document was sent to the Unions in later correspondence.

When Blevins asked if it was the Respondents' intention to integrate any of the other Holly Farms divisions or classifications into Tyson, Hogg replied not to his knowledge. In response to Blevins' question as to what the Company would do with the yardmen,[205] Hogg answered whatever

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[205] As noted, at the time, there were about 35 yardmen in the Holly Farms eastern division and about 10 in the western division.

was feasible. Replying to another inquiry from Blevins, Hogg advised that Holly Farms' local drivers also would be offered jobs with Tyson.

Hogg repeated that the Company representatives were not there to negotiate about where the drivers would go, but about the impact. Blevins responded that the Unions' representatives were not going to negotiate that day on impact because they did not feel it appropriate and they also did not have the necessary information that had been requested. Blevins asked if the Company was refusing to bargain with the Unions. Hogg answered, no, the Company was willing to bargain concerning the impact of this decision but was not

willing, at that time, to bargain concerning its decisions.

During that meeting, Hogg informed the Unions that the Respondents' plan was to no longer have a Holly Farms transportation division; that that division was going to be integrated into Tyson Transportation; and that, therefor, the Unions no longer represented the employees.[206] However, it is undisputed that neither Hogg nor any Company representative told the Unions in so many words that Holly Farms was withdrawing recognition as of September 12. However, as Irwin attested, the Company's statement of

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[206] As Tyson Transportation, before the takeover, had approximately twice the number of drivers than had Holly Farms, if, as argued by the Respondents, the merger of the two transportation systems was lawful, the Unions no longer would have majority support in the combined group.

its willingness to continue to recognize and bargain with the Unions related solely to bargaining with respect to impact of the Respondents' announced decisions. Blevins' response was angry. He told the Respondents' representatives that they would bargain with the Unions; that the Unions had been elected and certified to represent the drivers and that the Unions would not go away. As the meeting ended, Blevins told Hogg that the Company did not have a right to decide to bargain only over the impact of its decisions. Hogg answered that this was a legal matter and suggested that Blevins have his attorney contact him. Blevins reiterated his protests that the Company could not make those decisions,

and that he was going to defend and represent the unit people at whatever costs. He promised that the Unions' attorney would contact Hogg.

There were no further discussions concerning a new contract that day, and September 12 was the parties' last negotiating sessions.

(g) <u>The September 12 job offer to unit drivers</u>

On September 12, at the conclusion of the negotiating session, Hayes, over his signature as vice-president of the Holly Farms Foods, Inc., Transportation Division, on that Company's stationery, sent copies of the following letter to all Holly Farms drivers:

> Tyson Foods, Inc., has decided to assume all long distance transportation functions and responsibili-

ties related to Holly Farms operations.

All current Holly Farms Transportation Division drivers are to be offered employment with Tyson Foods, Inc. Transportation Department, as Tyson drivers, under the Tyson Pay Plan. Fringe benefits currently in effect will be continued for Holly Farms drivers who accept employment with Tyson, as prescribed by the merger agreement. Tyson will recognize length of service at Holly Farms, as required under Tyson policies.

Please contact John Sloop on or before September 22, 1989, for your processing to become a Tyson Foods employee.

(h) Direct negotiations with unit drivers

In accordance with the parties' stipulation, I find that after the September 12 negotiating session and mailing of copies of the above letter to drivers offering them jobs with

Tyson, Tyson and Holly Farms management and personnel representatives met with small groups of the long distance drivers. At these gatherings, the Tyson representatives explained the terms and conditions of employment applicable to Tyson drivers, under which the recipient drivers would be working if they accepted the offer. These meetings began on September 12 after the negotiating session had ended and continued.[207]

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[207] Irwin and Hayes testified that these meetings with Holly Farms drivers continued through September 22. As described by Lankford, at meetings he attended with David Hayes and Howard Baird, Tyson's vice-president for industrial relations, after Hayes had explained the Tyson system, its work rules, procedures and, generally, how things would be when integration took place, Baird would answer questions. At each of these meetings, questions arose as to what would happen to the Unions. Baird's reply was that, once the Holly Farms and Tyson transportation departments were integrated, the Teamsters Union no longer would have a majority of employees in the department they

(continued...)

(i) <u>The alleged constructive discharges of 47 unit drivers</u>

In accordance with the parties' stipulation, I find that the 47 long distance drivers named below were among the 209 drivers to have received David Hayes' above September 12 letter offering them employment with Tyson under new terms set by Tyson and that, for reasons consistent with the testimony of long distance drivers Donald Ray Kanupp, Fred Royal and Curtis Eastridge, these 47 drivers rejected the employment terms set forth in that letter and did not continue to work for Ty-

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[207](...continued)
represented and, therefor, would no longer be the employees' representative.

son.[208] The other drivers who received the September 12 job offer accepted.

The 47 drivers who refused the September 12 offer, alleged as constructively discharged in violation of Section 8(a)(1), (3) and (5) of the Act, were:

Earl Howell
Fred Royal
Gene Harris
Danny Osborne
Bill Ray Johnston
Dan Wingler
Ray Kanupp
George Glass
Bryant Welborn
James Spicer
Mike Hamby
Mike Maudlin
Thomas Alexander
Larry Eldreth
Donnie McClary
David Anderson
Butch Miller

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[208] As noted, when the September 12 offer was made on Holly Farms stationery, rather than that of Tyson as the prospective employer, Tyson had been in control for approximately 2 months.

Gene Hester
James Sparks
George Barber
Teddy Ray Hayes
Steve Eller
Curtis Eastridge
Donald Dollar
Jerry Fisher
R. J. Absher
Clark McNeil
Earl Eller
Jerry Blackburn
Kenneth Eller
Sam Badgett
Robert Crook
Harden Branscome
Bill St. John
Mike Dancy
Thomas Roope
David Laney
Zane Filipic
Denny Patrick
Romey Nelson
David or Danny Howell
Jerry Mealy
Patrick Owens
Donnie Blackburn
Jerry Miller
Michael Simmons
Mike Staley

Eastridge testified that, after receiving his copy of the September 12 letter as an enclosure with his paycheck, on September 13, he spoke to Lankford by phone. Lank-

ford, in answering Eastridge's questions, told him that if he worked for Tyson, Eastridge would be expected to be on the road for from 10 days to 2 weeks at a time[209] and that he would receive Tyson wages, not Holly Farms wages. Eastridge replied that the Unions represented him and that he was not signing on to work for Tyson at a lower wage rate than what he then was earning. Lankford told Eastridge that if he did not sign, he would not be called to work after September 22. Eastridge emphasized that he wanted to make clear for unemployment compensation and other purposes that if the Company refused to call him to work, it would be ter-

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[209] Holly Farms drivers had been average 3 to 4 days on round trip.

minating his employment—he was not quitting. Lankford answered that the Company would look it differently; that he was quitting.

Kanupp testified that, after receiving the letter, on September 20, he phoned driver-coordinator John Sloop, to whom responses were to be directed, and declared that he was not going to sign the letter and take another decrease in pay. Sloop suggested that Kanupp stop by his office and talk to him. When Kanupp did so later that day, he again told Sloop that he could not sign the letter to take another decrease in pay. When Sloop suggested that he try it, Kanupp said no.

Royal, too, received the September 12 employment offer. He related

that during the evening of September 22, dispatcher Rex Grider[210] called and told Royal that if he did not sign the paper by midnight, he no longer would be called to work. When Royal asked if he was fired, Grider told him, no, it would be a voluntary quit. Royal stated that he had not quit, but Grider told him, "We will not call you anymore."[211]

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[210] The parties stipulated that Grider, while not a supervisor, had acted as a Respondents' agent within the meaning of Section 2(13) of the Act in making the September 22 telephone call to Royal.

[211] Seven or eight of the 47 drivers who declined work at the specified terms, including Hester, Branscome and T. R. Hayes, had retrieved the initial acceptances from David Hayes and John Sloop, having explained that they did not want to be away from home as long and wanted to be able to shower in a motel. They were concerned that Tyson did not reimburse its drivers for motel rooms.

(j) Continued refusal to furnish the merger agreement; parties' positions; withdrawal of recognition from the Unions

After the September 12 negotiating session, the parties, in a series of letters to each other during which the Unions continued to seek a copy of the Respondents' inter sese merger agreement first requested on September 12, explicated their respective views on the disputed bargaining obligation as it related to the drivers-yardmen unit. In this correspondence, a summary of which follows, the Respondents also withdrew recognition from the Unions.

By letter, dated September 15, to Respondents' attorney Hogg, Merl E. Kelly, chairman of the Unions' negotiating committee, asked for various items of information, including the

Tyson Foods/Holly Farms merger agreement,[212] previously requested orally by Blevins during the September 12 negotiating session. In his letter, Kelly stated that the date sought was necessary to enable the Unions to perform as bargaining agent.

Hogg, in his September 20 reply, after defending against various statements by Kelly, rejected the Unions' request for all documents on grounds that it did not appear that any of the requested information related to legitimate bargaining objectives and that the Respondents did not believe that the Unions were en-

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[212] Since the Tyson Foods/Holly Farms merger agreement was the subject of the only refusal to bargain allegation based on failure to furnish requested information, it is not relevant to refer to the other items sought.

titled to the requested documents. Hogg reiterated his willingness to discuss the Unions' entitlement to such information with their attorney.

By letter, dated September 19, to Don Tyson, Tyson's chairman and chief executive office, Springdale, Arkansas, and to Lankford, Union secretary-treasurer B. D. Blevins put the Respondents on notice that the drivers and yardmen in the certified unit, having been required in the September 12 letter to sign a statement accepting employment with Tyson or be considered to have resigned their employment, had not waived their rights under the Act by having signed such a statement. In his letter, Blevins also demanded that Tyson meet with the Unions to negotiate a

collective-bargaining contract covering the employees in the drivers-yardmen unit, and to continue the employees under their then-current employment terms until such a contract was reached. Finally, Blevins demanded that the Respondent bargain with the Unions over both the decision to move the employees from Holly Farms to Tyson, and as to the effects of that decision. Blevins set forth the Unions' understanding that Tyson and Holly Farms were now the same Company for all purposes and that the Unions would treat them as such.

The first response to Blevins' above letter came from Howard D. Baird, Tyson vice-president, industrial relations, in correspondence dated September 26. Baird defended

the Respondents' requirement that the Holly Farms drivers sign a statement that they wished to be employed by Tyson Transportation as that Company's means of determining who was interested so as to enable a decision as to whether it would be necessary to hire additional drivers. Baird concluded his letter with the following paragraph:

> With regards to your demands to meet with you to negotiate an agreement for these drivers, we must refuse in as much as they will be part of the considerable larger unit with entirely different scheduling, terminal locations, hauling distances, and management. As such, it is our feeling that a bargaining obligation does not exist. We must also refuse to meet and bargain with you over the decision in as much as it is entirely within our prerogative and due to changing conditions and economic needs. With

> regards to the effect of that decision, you are advised by the Holly Farms negotiating representative that they are prepared to negotiate on such effects which, as I witnessed, you refused.

Blevins, by September 29 correspondence to Hogg, reiterated the Unions' September 12 position that the Respondents were obliged to bargain with the Unions over any decision to move Holly Farms drivers into Tyson Transportation, as well as the effects of such decision or transfer. He repeated the Unions' request that Holly Farms, Tyson and/or both meet with the Unions to negotiate a collective-bargaining agreement covering the employees represented by the Union and that the current terms and conditions of employment be continued until a contract had been signed.

Finally, the Unions restated their request for the information, including the merger agreement, sought in Blevins' September 15 letter.

In correspondence, dated October 10, Hogg replied to Blevins' September 29 letter point by point. Hogg noted, contrary to the Unions, that Holly Farms was the only Company that recognized Blevins' unions; that Hogg had represented only Holly Farms, not Tyson, in bargaining with the Unions concerning the drivers and yardmen; that nobody but Holly Farms was obliged to bargain with the Unions concerning the employees in question; and that the Tyson management personnel who had attended bargaining sessions had been there out of courtesy and to provide any needed

information to Holly Farms negotiators.

In his October 10 letter, Hogg disagreed with Blevins that Tyson did not have a right to integrate the transportation operations without bargaining with the Unions over the decision to integrate as well as over the effects of that decision on the unit employees. He noted that Holly Farms, in fact, had offered to bargain with the Unions concerning the effects of impact of that decision. Hogg rejected the Unions' request to continue the Holly Farms' transportation employees under the terms and conditions of employment that had existed as of September 12 on the ground that, if Holly Farms were to recognize an obligation to continue

that status quo, such recognition, in effect, would deny Tyson's right to integrate the operations.

Hogg noted that the Unions, on September 12 and since, had not asked Holly Farms to continue contract negotiations, as distinguished from impact negotiations, and that if the Unions had requested continuing contract negotiations with Holly Farms until the integration was implemented, Hogg would have agreed. Hogg concluded his letter with the following offer to the Unions:

> 1. Holly Farms will meet with [the Unions] and negotiate in good faith with regard to the wages, hours and working conditions of the employees in the [drivers-yardmen] unit described in NLRB Case No. 11-RC-5571, until such time as it is abundantly clear that

> the Holly Farms transportation operation has been fully integrated into the Tyson Foods transportation operation.
>
> 2. These negotiations will include impact or effects negotiations at your pleasure.
>
> 3. These negotiations are to take place upon a clear understanding that Holly Farms is dealing with you and Tyson Foods is not.
>
> 4. No contention is to be made later on that either Holly Farms or Tyson Foods has waived the right to refuse to negotiate based on their position that a legally adequate integration has already taken place. Otherwise stated, Holly Farms' participation in negotiations is not to be argued as showing that either Holly Farms or Tyson Foods admits that the 11-RC-5571 unit remains intact at this time.

In Hogg's October 10 response to Unions attorney J. David James' September 28 letter, he distinguished certain cases that James had cited in support of why the Respondents should furnish the requested merger agreement. Hogg did this, in part, by pointing out that in one of the cited cases, the Employer representative's explanation of the terms of the there-requested agreement, had been found unreliable and, therefor, unlawful, because of that representative's lack of personal knowledge of the content. Hogg, however, noted that that was hardly true in his case. While continuing to deny any obligation to furnish merger agreement data, Hogg ended his letter by

quoting the following provision from the merger agreement:

> Article V. Certain Covenants
>
> Section 5.8. Employee Plans. The parent agrees [that] following the Effective Time the Surviving Corporation will provide, for a period of two years after the Effective Time, employees of the Company (excluding for purposes of this Section 5.8 employees covered by collective bargaining agreements or who are members of a collective bargaining unit or labor union) with employees benefits following the Effective Time which are no less favorable in the aggregate than the employees benefits provided under the plans and arrangements for such employees by the Company as of the date hereof.

James' October 17 reply to Hogg noted his disagreement as to what the law required in the way of information from the Respondents. He noted the Unions stood by their earlier

request for all of the information including, but not limited to, a complete copy of the merger agreement and that the Unions were supported in this by the complaint that had been issued by the Board's Regional office. The Unions, to facilitate this process, stated their willingness to enter into a confidentiality agreement with the Company.

Also on October 17, James sent a second letter to Hogg pursuant to Blevins' request that James answer Hogg's October 10 letter to him. In this letter, the Unions expressed their disagreement with Hogg's characterization that they did not wish to engage in impact bargaining. The Unions reiterated their readiness to bargain with Tyson and Holly Farms on

all issues, including the decision to transfer the drivers to Tyson and the impact of that decision, but reaffirmed their need for the requested information to enable the Unions to bargain effectively. James questioned the seriousness of Hogg's previous offer to negotiate for a collective-bargaining agreement only until such time as integration was implemented, asking who would determine when Holly Farms Transportation had been so fully integrated into Tyson Transportation as to end contract negotiations. James also challenged certain Company positions, including Hogg's representation that Holly Farms would negotiate only if it was clearly understood that Holly Farms, alone, was dealing with the

Unions and that Tyson was not. He asserted that both Tyson and Holly Farms were obliged to bargain.

In his October 23 reply to both of James' October 17 letters, Hogg reiterated the Respondents' basic positions. Responding to the statement in James' letter that the Unions did not wish to engage in impact bargaining until it received the remaining requested information, Hogg pointed out that the information sought related to details of the process that had resulted in the decision to integrate. As Hogg did not believe that the decision to integrate was bargainable, he did not believe that the Unions were entitled to information as to how that decision had been made. Hogg, therefor, would not ad-

vise that the requested information be provided.

Hogg, also agreeing that it would be "a little silly for the Unions to continue contract bargaining during the time when the integration process was taking place," set forth in his view that the integration process already had been completed. Hogg again asserted corporate duality, declaring that Holly Farms insisted that Tyson, not itself, had the right to integrate these transportation operations and, therefor, had the right to employ the Holly Farms drivers under Tyson's wages, hours and employment conditions. The issue of whether the unit employees could be integrated into Tyson was not bargainable. Hogg concluded by reiterating that he had

not represented Tyson in bargaining with the Unions because Tyson did not have any bargaining relationship or obligation with the Unions. Hogg noted that it did not make any difference whether James agreed with the Respondents' position on that point as far as Holly Farms' willingness to bargain is concerned.

(k) Comparison of Holly Farms and Tyson pay and benefits plans

Under the Tyson pay plan, long distance drivers earned less for comparable effort than under Holly Farms. While, under the Holly Farms pay plan, announced December 16, 1988, all its eastern division drivers were be paid at a basic rate of 28.25 cents per single mile driven, at Tyson, the mileage rate for drivers with 0 to 3 years seniority grad-

ually increased on a scale ranging from 20.5 to 25.5 cents per mile. While Holly Farms allowed $6.95/hour breakdown pay, to be paid beginning 2 hours after the driver called in his breakdown report and continuing until he again began to move or for a maximum of 8 hours, the Tyson plan did not include such an allowance. Layover pay at a rate of $45 was made available by Holly Farms for delays at customers' premises starting at the 17th hour past a driver's scheduled delivery time, while Tyson provided layover pay of $50/day when unloaded and available for dispatch by noon local times. While Holly Farms allowed $8/stop and $12/pickup pay, Tyson afforded $5 for pickups/drops; no drop pay for straight loads, and a

multi pickup/drop arrangement payable at $10 for the first two stops and $15 thereafter. No stop pay, as such, was mentioned in the Tyson plan.[213]

Holly Farms also provided its employees with a benefits schedule which included, as noted, 8 paid annual holidays at $55/day; paid funeral leave and jury duty;[214] paid vacations ranging in length from 1 week after 1 year of service, increasing to a maximum of 4 weeks after 15

[213] The smaller number of Texas-based drivers in the Holly Farms western division received a lesser rate of 25 cents/mile with the other employment terms the same. However, unlike Tyson drivers, who started at 20.5 cents/mile and worked up to 25.5 cents/mile only after 3 years' service, the Holly Farms western division drivers received the 25 cent/mile rate from the start of their employment.

[214] Jury duty was compensated as the difference between $55/day and what the employee received for serving on the jury.

years with the Company; paid group insurance. including life, accidental death and dismemberment, weekly disability benefits, hospital and surgical expense, major medical, dental and vision care assistance plans,[215] and a retirement plan.

Except that Tyson afforded its driver 7 annual paid holidays at $45 /day, with no reference to paid jury or funeral leave, fringe benefits available to Tyson drivers are not clearly defined in the record. However, the record does establish that one of the terms of the merger agreement, which was included at the insistence of Holly Farms' board chair-

[215] After 3 months on the job, Holly Farms employees had the option of purchasing the same insurance for their dependents as the Company provided to them.

man, was that Holly Farms job benefits should continue intact for former Holly Farms eastern division employees in Tyson's service for 2 years after the merger.

Although the drivers' mileage compensation rate, schedule of other payments, such as stop and pickup pay, and job benefits were superior under Holy Farms than under Tyson, the Respondents, nonetheless, argue that the former Holly Farms drivers actually earned more money annually while working for Tyson because Tyson Transportation, more than had Holly Farms, required that each driver spend longer periods on the road accumulating compensable mileage. Holly Farms' drivers had averaged 3 to 4 days away from home on each round

trip, driving a weekly average of 1,800-2,000 miles, generally making deliveries at a given location and then returning, preferably with a backhaul load. This was because the Holly Farms transportation division was operated as a delivery arm of that Company's poultry business. Tyson Transportation, on the other hand, considered itself an independent Company profit center in the freight business and, accordingly, actively pursued hauling opportunities wherever available. So, while a Tyson driver, like a Holly Farms driver, initially would depart to deliver his Company's product to one or more customers, the Tyson driver, after completing those deliveries, but before returning, would be fur-

ther dispatched to pick up and deliver various other types of freight, running as many as six "legs" to the overall journey and averaging approximately 2,500 miles/week. Tyson drivers averaged 10-14 days on the road per trip.

(1) Arguments concerning the refusals to bargain

The General Counsel and Union contend that Tyson, as Holly Farms' successor, was obliged to recognize and bargain with the Unions with respect to the employees in the certified drivers-yardmen unit; that the Respondents failed to meet this duty by unilaterally announcing the above changes on August 8 concerning integration of the western division drivers into Tyson transportation and the unilateral reductions in the eastern

division by the layoff of 71 drivers and removal of 47 tractors;[216] by the September 12 announcement that the entire Holly Farms transportation division would be merged into Tyson Transportation under unilaterally changed employment terms for affected employees; by refusing to bargain about the decisions to make these changes in the unit during the certification year; by unilaterally withdrawing recognition from the Unions as bargaining representative; and by refusing to furnish the Unions with a copy of their merger agreement setting forth the Respondents' under-

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[216] While, as noted, these initially announced changes affecting the eastern division were later rescinded in favor of other unilaterally-imposed changes, this was not done until after the drivers to be excessed had been notified for some time.

standing as to job benefits for unit employees. These parties also assert that the Respondents had violated Section 8(a)(5), (3) and (1) of the Act by constructively discharging the above-named 47 employees for having declined to work under the unilaterally-changed terms and conditions of employment; by unilaterally announcing the end of the Holly Farms retirement program; and by the actual merger of unit employees into Tyson Transportation that followed, with changed employment terms.

The Respondents, whose bargaining positions in good measure were set forth in the foregoing exchanges of correspondence, in part, argue that elements of the asserted constructive discharges were not met since the

Respondents had not intentionally sought to force its employees' resignations because of their union activities by making conditions so difficult as to render continued employment intolerable. In this regard, the Respondents contend that the proffered employment conditions, the same as already applied to Tyson's 550 drivers, represented the going industry pay rates and were not discriminatory punitive or unpleasant as indicated by the fact that the overwhelming majority of the drivers who had received the September 12 letter had elected to accept and to maintain their employment relationship with Tyson. The Respondents further argue that even if the employment terms offered by Tyson had been less desir-

able, there is no evidence that the 47 disaffected employees would have been influenced by this in their decisions, as there was no separate showing that these employees had studied the Tyson pay or had had it explained to them by the Unions.

The Respondents further contend that only Holly Farms, not Tyson, had a duty to bargain with the Unions, while Tyson had a right to make the changes announced and invoked.

Immediately after the September 12 negotiating session, the Respondents began a comprehensive program to quickly and completely integrate Holly Farms into Tyson. In this process, both Holly Farms' transportation and production facilities were absorbed.

(m) <u>The integration of Holly Farms transportation division into the Tyson transportation system</u>

After the September 12 meeting with the Unions, Tyson officials Irwin and McNeese returned to that Company's Springdale, Arkansas, headquarters and immediately drafted a rough outline of a plan to integrate the two companies in applicable time frames. They believed that Holly Farms' smaller western (Texas) division could be completely integrated by October 2, with implementation by that date of Tyson's fleet manager's dispatching concept and the start of work on a new Texas terminal away from the former Holly Farms Seguin and Center plants and the Tyson Carthage plant, which could service all three production facilities.

In reviewing Holly Farms' eastern division, Irwin and McNeese discussed establishing a terminal at Statesville, North Carolina, centrally located between Wilkesboro and Monroe, since a facility, so located, could handle tractors from Temperanceville and Richmond (Glen Allen).

In implementing these plans, a Carthage, Texas, terminal was opened in an existing building on October 16 under the Tyson system with a Tyson operations manager and a fleet manager who had been with Holly Farms. As no suitable facility was available in Statesville, a new terminal, instead, was opened in Wilkesboro, near the airport, 1-2 miles out of town in a building that had been owned by Holly Farms.

Before the merger, Holly Farms which principally was a producer of fresh poultry and related products, observed a product ratio of about 60 percent fresh to 40 percent frozen. Tyson, predominantly a frozen poultry producer, had a reverse product ratio. As of September 12, Holly Farms owned approximately 170 tractors, of which around 120 were used for long hauls and 50 were for local use. Around 220 drivers, including extra board,[217] were assigned to these vehicles.

As of September 12, Tyson owned and operated 400 to 450 tractors, including 400 long haul and 40 to 50 shuttle (local) tractors. Including

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[217] Extra board drivers did not have regular tractors assignments and filled in for absent full-time drivers.

extra board and team operations,[218] approximately 550 drivers were used to operate those vehicles.

As noted, before the merger, Holly Farms and Tyson Foods had different role views of their respective transportation departments. Tyson saw its transportation system as a profit center within the corporation, while Holly Farms transportation was an adjunct to its production operations. Accordingly, while the Tyson transportation group considered itself in the freight business, picking up and carrying cargo of various kinds to locations far removed from its trucks points' of origin, as opportunity allowed, the Holly Farms group was more

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[218] Team operations, differently applied by Holly Farms and Tyson, will be discussed below.

influenced by plant management and existed principally to move that Company's products from its production facilities to customers.

While the drivers in the Holly Farms' eastern division transportation group ultimately reported to David Hayes as vice-president for transportation, the drivers in that Company's western division reported to a division vice-president for the production in Center, Texas, and were controlled, not by the transportation group but by the production group. Both Hayes and the western division vice-president reported to Blake Lovette, Holly Farms' president. However, even though the eastern division drivers reported to the transportation group, they still were sub-

ject to appreciable influence by Company production officials, and plant and grow-out managers could decide how many tractors could be domiciled at their plant facilities.

(i) Changes in the dispatching system

Under the Holly Farms system, dispatchers were based at each of the Company plants. Head dispatcher, Curtis (Bob) Absher, was based at that Company's Wilkesboro headquarters complex and lead and regular dispatchers were located at outlying plants. Long distance drivers were hired at the respective plants. All orders for products were taken at Wilkesboro and were then forwarded to the relevant plants to be filled. The dispatchers based at those plants would assign loads to Company-owned

trucks, often on a first-in, first-out basis. At Wilkesboro, the then-outhaul manager, Barry Wood, as deemed necessary, would book the outside carriers. This would be done at outlying facilities by the lead dispatchers. The Wilkesboro and Center locations had groups that would solicit return trip backhaul cargos destined for the immediate areas of Holly Farms' plants.

In absorbing the Holy Farms trucking operation, Tyson basically extended its own system. In the post-integration period, after September 22, the dispatchers were removed from the plants and, in their place, fleet managers with authority to assign drivers, ultimately were situated at Tyson's four terminals, at

Springdale and Russellville, Arkansas; Wilkesboro, North Carolina; Oxford, Alabama; and Carthage, Texas.[219] All sales orders were received at the Springdale central sales office which determined which facility would fill a given order. The director of traffic's group[220] in Springdale, which first received the order from the sales department, would determine which load was to be delivered from which terminal, based principally upon geographic location with respect to the plant and the customer. The director of traffic

[219] Including the production facilities obtained from Holly Farms, these 4 terminals served production plants or complexes in 33 municipalities scattered throughout Virginia, North Carolina, Georgia, Alabama, Arkansas, Missouri and Texas.

[220] Bruce Clark, who before the merger was Tyson's director of outside transportation, became director of traffic.

then would send the order to the operations manager heading the selected terminal[221] who would allocate the trucks to service the total number of orders. The operations manager then would convey the sales order to a given fleet manager at the terminal who, in turn, would assign the load to the driver,[222] telling the driver where to pick up the loaded trailer and the destination. Where the terminal was not situated to handle an order, the fleet manager, through his

[221] At the time of the hearing, the operations manager's position for North Carolina, in Wilkesboro, was unfilled and David Hayes who had become Tyson Transportation's eastern division director, filled both positions.

[222] The number of fleet managers at a Tyson terminal varied according to the size of the terminal. Filling roles comparable to Holly Farms dispatchers, they were responsible for the operation of groups of 50 to 60 tractors and the drivers to whom those vehicles were assigned.

operations manager, would so notify the Springdale operations manager who then would advise the director of traffic to book the services of an outside carrier,[223] which he did through subordinate outside truck coordinators. Terminal operations managers had authority to hire, discharge and discipline. Fleet managers only could discipline.

Under Holly Farms, the same dispatchers at various plants, who dispatched the long distance drivers, also dispatched the local drivers, who usually made deliveries within a 150 mile distance of where they were

[223] In this regard, the terminal operations manager was functionally comparable to Holly Farms' lead dispatchers, based away from Wilkesboro who, as noted, engaged outside carriers for their surplus loads. At Wilkesboro, that service had been rendered by the then-outhaul manager, Barry Wood.

based. Under Tyson, local drivers, now designated shuttle drivers, all were dispatched by a Wilkesboro-based shuttle manager who was part of the transportation department. These local drivers will be separately considered below.

The parties are in accord that, following merger, there was substantial integration of loads and they stipulated that, during the week of October 2, former Tyson drivers and tractors handled 187 Holly Farms trailer loads and that former Holly Farms drivers and tractors handled 42 trailer loads of Tyson products.

The fleet manager system was introduced at Wilkesboro on September 23, following extensive training by Tyson representatives from Spring-

dale, between September 12 and 22. From that introduction date, drivers were expected to call the Wilkesboro fleet managers for assignment. Between October 12-22, Holly Farms' lead dispatchers were offered positions with the Tyson Transportation management group. One of these, Roy Myers, a lead dispatcher at Temperanceville, accepted the shuttle manager's position in Wilkesboro. Two others rejected, respectively, the operations manager's job and a fleet manager's position at Wilkesboro. The two fleet manager jobs in Wilkesboro ultimately were taken by former Holly Farms dispatchers.

Supporting the fleet managers at Wilkesboro were clerical employees who had been on staff at Holly Farms

as payroll clerks with experience in routing, payroll functions and clerical skills. Redesignated as dispatch coordinators, they and the fleet managers began to access the Tyson computer system, which had been brought to Wilkesboro. Basically, two dispatch coordinators working with each fleet manager spoke daily to each driver, providing routing and fuel price information, assisting with logs and making computer entries of all data concerning the drivers' payroll and cash advances.

Unlike the first-in/first-out assignment system used by Holly Farms under which the first driver to return to the terminal would be the first to be assigned the next load, Tyson's fleet managers attempted to

equalize mileage among the 50-60 drivers assigned to them, thereby more evenly distributing the drivers' earnings. Accordingly, drivers who had just completed the longest runs would be offered the shortest runs. However, in making these assignments, Tyson tried to recognize driver preferences where all things were equal. Accordingly, some drivers liked to stay within a 500-800 mile radius of their terminals while others preferred 1,500 to 1,800 mile runs. Some leaned toward the multi-drop less than trailer load (LTL) deliveries associated with frozen product runs.[224] If the available drivers

[224] Since frozen product was more expensive than fresh, customers were less likely to order a full trailer load of the frozen and so LTL loads often had product for sever-
(continued...)

were sufficient in number to make the necessary deliveries and if all had accumulated the hours, fleet managers tried to observe the drivers' preferences in making assignments.

Holly Farms had utilized separate dispatchers at each plant for outhaul and backhaul. Accordingly, if a Holly Farms driver was preparing to make an outbound product delivery, he would get his assignment from the outhaul dispatcher at his plant location. If such driver was picking up a backhaul load, he would call a different dispatcher depending upon his geographical location at the time and

[224](...continued)
al destinations before the trailer was emptied, necessitating more time on the road. Tyson's outbound LTL freight, at 40 to 50 percent of total deliveries, contrasted with Holly Farms' 15 to 20 percent.

he also would call a different dispatcher in the backhaul group. Holly Farms did as the drivers on outhaul deliveries to call the central Wilkesboro office and some would. However, drivers who were not domiciled at Wilkesboro would call their home location.

Under Tyson Foods, the driver called one fleet manager who gave him his assignment whether outhaul or backhaul in whatever part of the country he might be.

(ii) Backhauling

Holly Farms had operated a centralized backhaul department which solicited and booked freight for return runs. Summaries of that Company's records show, however, that during the fiscal years ending May 31,

1987, and 1988, respectively, roughly 41 or 42 percent of Holly Farms return runs came back empty (deadheaded) and did not result in revenues. David Hayes explained that this high deadheading rate had been due to Holly Farm's primary use of its own equipment to haul its own product to market and that the backhaul program had not been effective because of that Company's reluctance to leave its outbound traffic lanes to obtain backhaul freight.

However, under Tyson, outbound trucks, after completing deliveries, were directed to go wherever necessary to obtain additional freight without regard to the nature of the freight or as to where it went as long as additional revenues resulted.

Accordingly, while long haul drivers for Holly Farms might be gone an average of 4 days per trip, Tyson drivers who might be additionally routed several times, could be on the road for an average of 10-14 days. Tyson drivers also could expect to be sent out again 2 days after they had returned.[225]

Before the merger, as noted, Holly Farms drivers had averaged 1,800-2,000 miles/week, but at the time of the hearing, with additional backhauls, they were driving 2,350 to

[225] For use in backhauls, Tyson had a 48 states general commodities operating authority from the Interstate Commerce Commission (ICC), granting both general commodity and contract operating authority. This allowed Tyson to haul anything between states on the continental United States except household goods and explosives. Since the merger, Holly Farms' ICC motor carrier number was discontinued, all operating authority was combined and all trucks operated under Tyson's authority.

2,500 miles/week. This brought them up to within 100 to 200 miles/week of what the former Tyson drivers were averaging, and it was anticipated that with additional experience with the Tyson system by fleet managers and drivers alike, that that gap would be closed.

Tyson's backhaul operations were centralized in Springdale in a group under the solicitor who, in turn, reported to the sales manager. This group, by telephone, constantly solicited backhaul loads across the country to find freight sufficient to refill trucks that were emptying in broad, divers regions. Fleet managers advised these solicitors where their trucks were emptying and the solicitor's group would attempt to

obtain loads to match the available trucks. When such a match of load to truck was made, the fleet managers would not have discretion to further assign specific trucks to handle specific loads unless, at a given location, the same numbers of trucks and loads were available.

(iii) Yard personnel

Under Holly Farms, yardmen were transportation department employees who reported to the dispatchers. Yardmen dropped incoming trailers at specified places, cleaned the trailers' interiors; and, after unhooking the trailers, parked the tractors at specified places. When outbound trailers were loaded, yardmen hooked the trailers to the tractors and drove the tractors across the Compa-

ny's scales. They also fueled tractors, installed load locks, loaded stabilizer bars to stabilize loads and closed and sealed trailer doors. Their duties included checking the slack adjusters on the brakes beneath trailer, checking the equipment and replacing light bulbs as necessary.

Under the Tyson system, yardmen were assigned to the plants rather than to the transportation department, and had fewer duties. Under Tyson, drivers, not yardmen, were responsible for hooking trailers to tractors and for weighing and fueling their tractors. When drivers return, they, rather than the yardmen, were required to unhook the tractors from the trailers, to fuel and to park the tractors.

Tyson had transferred the yardmen to individual plant locations by around November 1. At the plants, their duties were to move and to empty trailers; to partially or fully load them in and out of plant loading facilities. Yardmen continued to wash the trailers, inside and out. They precooled trailers before loading; insured that enough pallets were available at the loading dock; partially or fully loaded trailers, moving them in and out of the plant loading facilities; secured the load inside the trailers, put in load locks and sealed the trailers. They moved trailers to the pickup areas so that the drivers could hook the trailers onto their tractors and depart.

Under Tyson, the yard personnel reported to the transportation coordinators, all of whom were former dispatchers transferred to plant payrolls. These transportation coordinators merely expedited loads and ensured that the paperwork was done. While as dispatchers under Holly Farms, they had supervised groups of drivers domiciled at their plants, they no longer participated in load selection, assignments of loads to drivers or other driver supervision. Transportation coordinators were so named because they were responsible for coordinating production with transportation functions.

Tyson continued to employ the same number of yardmen at Wilkesboro as had Holly Farms.

(iv) Shuttle (local) drivers

Under Holly Farms, local drivers were a part of the transportation division. Eleven Holly Farms trucks were based in Wilkesboro and six trucks in Monroe were used to make deliveries of 100 to 150 miles radius to customers in North Carolina. If all local delivery trucks were being used, additional local deliveries would be made by long distance trucks.

Under Tyson Foods, the local drivers were redesignated shuttle drivers and the number of shuttle deliveries dramatically increased. This was because Tyson products were sent to a cold storage facility in Charlotte,

North Carolina, from where they were shipped to customers.[226]

Tyson added more local drivers and extended the local delivery distance to about 250 miles one way. At the time of the hearing, Tyson had a total of 31 shuttle drivers. Of these, 4, for the first time, were based in Richmond; 2 in Temperanceville, 9 in Monroe and 16 in Wilkesboro. Shuttle drivers were part of Tyson Transportation, and all were centrally dispatched from the shuttle department at the Wilkesboro terminal.

Establishment of the shuttle department with drivers at all applica-

[226] Under Holly Farms, permanent cold storage facilities were not available, but such facilities occasionally were used for overflow when sales were poor and it was necessary to freeze product.

ble locations, was completed at the end of November.

(v) Plant and truckload integration

The parties stipulated to integration of plant product and of deliveries from an early date. Accordingly, the parties agree that during the week of September 25, Tyson and Holly Farms began to load their respective trailers with each other's loads. Tyson's plant at Shelbyville, Tennessee, which previously produced frozen poultry was turned over to the Holly Farms fresh division, but continued also to produce Tyson brand products. Since September, former Holy Farms plants now producing Tyson label products included those at Monroe, Richmond, Wilkesboro and Center. These also continued to produce Holly

Farms products. The Holly Farms Food Service operation in Wilkesboro, since the merger, produced more Tyson label products, using different formulations than before.

During the week of September 25, total loads of Tyson and Holly Farms products, excluding transfers, movi[illegible] on Company-owned trucks were 1,276 of a total of 2,527. Tyson trucks hauled 107 Holly Farms loads and Holly Farms trucks handled 35 Tyson loads. This mix thereafter increased and the Tyson freight rating system was put into effect.

(vi) Quality control and sales

The Tyson quality control system was put into effect at the Holly Farms roast chicken plant in Wilkesboro, where whole chickens and parts

were fully-cooked and prepackaged for sale.

The quality control system changed in that, where quality control managers, under Holly Farms, would answer to Blake Lovette, under Tyson, they were responsible to a quality control vice-president in Springdale.

The sales departments also were correspondingly integrated.

(vii) Work rules

Prior to the merger, Holly Farms had published its own work rules. David Hayes testified that, since the takeover, Tyson also had published work rules affecting Holly Farms employees, implemented around October 1. These new work rules were distributed to the 24 new employees hired since the takeover. Hayes,

however, was uncertain as to whether the new rules also were given to existing employees. He did not believe that Holly Farms employees at the time of the takeover were informed of the new work rules.[227]

(viii) Team assignments

To comply with the Interstate Commerce Commission restriction that no driver may drive for more than 10 consecutive hours, Holly Farms, when time restraints on a delivery required more than 10 hours of straight driving, would assign a team made up of a regular and an extra board driver to limit the amount of uninterrupted driving either would have to

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[227] While the Tyson work rules may not have been distributed, they were applied. In February 1990, two drivers were terminated for refusing a dispatch.

do. Such team assignments were not permanent, but were made for one trip. The Holly Farms system of using two drivers on an outhaul for trips that were longer than one driver could take under regulations, diminished driver earnings because mileage, the principal component of driver pay, was paid at a lower rate for team assignments. Accordingly, the more team operations a driver ran, the less his earnings.

Tyson, to comply with this regulation, used permanent teams, usually consisting of a married couple. Tyson did not follow Holly Farms' practice of matching up temporary teams of regular and extra board drivers and, where a load was going to take more than 10 hours to deliver and

time was critical, Wilkesboro would call Springdale and ask for a permanent team. If such a team was not available, Wilkesboro would inform the sales department that such a team was not available and ask that they inform the customers that the product would be delivered late. To avoid such late deliveries, Tyson, where possible, would seek more lead time.

(ix) Uniforms and Company logos

Holly Farms did not require that its management representatives and drivers wear uniforms, but, uniforms were mandated for Tyson managerial personnel and encouraged for drivers. Management representatives wore khaki shirts and trousers. The Company furnished these shirts with the Tyson logo over the right breast pocket,

and the executives' first names were stitched over the left breast pocket.

Tyson drivers, too, including those from Holly Farms, were furnished khaki shirts with the Tyson logo. Their own first names did not appear on the shirts. The individual provided his own trousers. For drivers, the Company also provided a coat and, occasionally, other over-wraps such as jackets. Driver use of uniforms was not mandatory because of laundering problems while on the road.

With respect to equipment, Irwin testified that there would be no change in the earlier system where Holly Farms had had its own tractor colors and logo. However, it was decided that new equipment all would

be purchased with the Tyson colors and logo on tractors and trailers but that the Respondents would not go through the expense of repainting all existing equipment. In this regard, the Respondents, at the time of the hearing, were in the process of replacing the 45-foot trailers in the fleet with larger units to provide greater cubic capacity.[228]

(x) Control of labor relations

Under Tyson Foods, the Tyson/Holly Farms direction of labor relations has been centralized in Springdale under Irwin, Baird and McNeese.

(xi) Safety

Before Tyson, Holly Farms' safety program was administered through the

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[228] Holly Farms has not done its own vehicle purchasing for long haul transportation since September.

Wilkesboro corporate safety and security office. Under Tyson, the safety program was administered from Springdale by a manager of safety and personnel who reported to McNeese, the transportation director. The Holly Farms corporate safety program was discontinued. Since his September 25 appointment as manager of safety and personnel at Wilkesboro, John Sloop was responsible for local safety activities. Cross-training was provided and Springdale safety personnel visited Wilkesboro to inspect all relevant areas and to ensure that drivers' files, including logs, were completed and in proper order, as required by law.

(xii) Tyson transportation department since July 18

Although Tyson was in control at Holly Farms from July 18, that Company made few, if any noticeable changes in Holly Farms' operations until after September 22. In that initial period, virtually all of Holly Farms' managerial, supervisory and employee personnel were retained in essentially their former positions, although managers were absorbed into the Tyson organization with Tyson job titles. Employees continued to work under the same terms and conditions of employment, producing and hauling the same product to the same customers as though the takeover had not occurred. It was only after the September 12 negotiating session that steps were taken to bring about the

above-described changes. Although, as noted, the Respondents, during the August 8-10 negotiating sessions, had notified the Unions that the two Texas locations, comprising the Holly Farms western transportation division, would be merged into Tyson Transportation, much did not occur in that regard affecting western drivers until October.

On October 16, a new Tyson terminal was opened at Carthage, Texas, the terminals near the plants at Seguin and Center were closed, and the 18 drivers at those terminals and their equipment were relocated to Carthage. About 10 trucks beyond those that had been moved from Center and Seguin also were transferred to the Carthage terminal. While the

Center and Seguin plants continued to be those nearest to the new Carthage terminal, that facility was the terminal geographically closest to Tyson plants in Waldron, Grannis and Nashville, Arkansas; Broken Bow, Oklahoma; and Dallas, Texas, none of which have attached terminals.

At the eastern division, after some initial transitional shuffling of transportation department personnel in buildings within the Wilkesboro complex, a new terminal opened during the first half of December in what had been a Holly Farms building located near the Wilkesboro airport, approximately 2 to 3 miles from the Wilkesboro complex. This new Wilkesboro terminal served the former Holly Farms plants at Glen Allen (Rich-

mond), Temperanceville and Harrisonburg,[229] Virginia; and Monroe and Wilkesboro, North Carolina, which plants no longer had attached terminals. However, the former Holly Farms drivers who had been domiciled near those plans when they did have terminals were not required to move although they, thereafter were dispatched from Wilkesboro. In this regard, Tyson excepted its former Holly Farms drivers from its rule requiring that drivers live within a 50 mile radius of their terminals.

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[229] As of September 12, the former Holly Farms fresh plant at Harrisonburg, which also had produced fast foods, such as Kentucky Fried Chicken and some IQF production, was assigned to the Tyson Foods Service Group, which sold further-processed, institutional-type poultry to hotels, restaurants, hospitals and schools. As a result of this redesignation, the Harrisonburg plant's product was redistributed so that only 40 to 50 percent went to traditional Holly Farms customers, while the rest went to Tyson customers.

Although Irwin testified to a Company intent that all future drivers be hired from and live near the Wilkesboro terminal, the records shows that of the 23 drivers hired at Wilkesboro since September 22, 3 were permitted to live near Monroe and 1 in the vicinity of Glen Allen. The rest of the new hires were domiciled in the Wilkesboro areas.

The record indicates, at least with respect to the eastern division, that while, since the autumn of 1989 all drivers have been dispatched by fleet managers at Wilkesboro, rather than, as before, by plant-based dispatchers, Tyson's Transportation, Eastern Division, essentially was under the same supervision as had been the Holly Farms eastern trans-

portation division. David Hayes who, as Holly Farms transportation vice-president had overseen the eastern division, remained in place in essentially the same role as manager of the eastern division of Tyson Transportation, except that he reported to Springdale. Curtis (Bob) Absher, formerly Holly Farms head dispatcher at Wilkesboro, under Tyson, became manager of outside transportation, booking independent carriers as needed and replacing the outhaul manager, Barry Wood, who previously had performed that function at Wilkesboro for Holly Farms. Roy Myers, the shuttle manager under Tyson, had been brought to Wilkesboro from a lead dispatcher's position in Temperanceville, another Holly Farms east loca-

tion. The fleet managers and dispatch coordinators with whom the drivers continued to work, formerly also had been part of the Holly Farms eastern division transportation dispatch system, and the new Wilkesboro terminal primarily serviced the Wilkesboro, Monroe, Harrisonburg, Temperanceville and Glen Allen plants, locations that had comprised the Holly Farms eastern division transportation system. From the time Tyson took control on July 18, the clear majority of the Tyson's Wilkesboro and Carthage-dispatched drivers had been Holly Farms drivers who continued to drive their assigned tractors to perform the same functions and to exercise the same skills as under Holly Farms.

Until January 1, 1990, what had been the Holly Farms transportation department continued to operate under the Holly Farms Interstate Commerce Commission (ICC) operating authority because of the time period required to enable Tyson to reissue numbers for and to relicense the tractors. However, since that date, all operations have been conducted under Tyson's operating authority.

(xiii) Changes in the computer systems; methods of payment; employee benefits

Before Tyson, Holly Farms, at Wilkesboro, used an IBM computer system, while Tyson operated with a Sperry Univac system located at Springdale. On September 22, the information in the Holly Farms IBM

computer concerning routing systems,[230] drops, deliveries and other related areas, were entered onto the Tyson corporate Sperry Univac system, and the Sperry system, which was brought to Wilkesboro, was used to facilitate the central controls exercised by Tyson over the Wilkesboro operation.

However, for 2 years after the Tyson takeover, the Respondents continued to use the Holly Farms IBM system for paying the eastern division drivers and for other former Holly Farms eastern division employees. Payroll information for the former Holly Farms east drivers, entered into a Sperry terminal in Wilkesboro, was

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[230] Computerized routings replaced the route books previously prepared and issued to Holly Farms drivers by John Sloop.

transferred to the mainframe computer in Springdale where the necessary deductions and net pay were computed. This information was transferred back to the Wilkesboro IBM system where the paychecks actually were cut, and the drivers paid by Holly Farms checks. This procedure, which applied only to the Wilkesboro and other eastern division locations, but not to the western division, was followed in accordance with the provision in the Tyson/Holly Farms merger agreement that Tyson continue Holly Farms job benefits for former Holly Farms employees for 2 years. This required continued use of the old Holly Farms computer system in order to facilitate maintenance of those separate benefits records. When the

2 year period of continued benefits expired, Tyson anticipated discontinuing those benefits and, thereafter, preparing payroll and paychecks for all on the Springdale Sperry Univac computer, from where the checks would be sent for local distribution. Tyson job benefits also would become applicable.

2. Refusals to bargain concerning the drivers-yardmen unit--discussions and conclusions

(a) Successorship

The General Counsel and Union argue that Tyson, as Holly Farms' successor, was required to bargain with the Unions as to the drivers-yardmen unit because Tyson, when it took control on July 18, had not exercised its right, existing at the time, to hire or retain Holly Farms' unit em-

ployees under new terms and conditions of employment. Instead, for about the first 2 months, Tyson had left those employees' employment terms essentially as under Holly Farms. Accordingly, with Tyson, Holly Farms' former employees had continued to work at the same locations, under the same pay scales and other terms and employment conditions, doing the same work using the same equipment, serving the same customers, reporting to the same supervisors, as before the takeover. The General Counsel and Unions argue that Tyson's bargaining obligation was triggered on July 18, when it began to operate the former Holly Farms business with an unchanged employee complement, and therefor, employed a

substantial and representative complement of former Holly farms employees. The General Counsel and Unions further assert that, in spite of the changes that have taken place since September 22 with respect to Tyson's efforts to integrate the transportation and other operations of the two Companies, the drivers-yardmen who had comprised the Holly Farms transportation bargaining unit remained identifiable, although relocated, and had not been accreted into the larger Tyson transportation system.

The Respondents, in turn, assert that Tyson's above-described operational changes had resulted in such complete integration of Holly Farms transportation into the much larger Tyson group as to have destroyed the

drivers-yardmen unit and vitiated the Unions' status as majority bargaining representative even though the Unions were still in their certification year. In so contending, the Respondents emphasize the changes that have occurred and distinguish between Holly Farms' bargaining obligation to the Unions and that of Tyson. The Respondents' position, as noted, is that Holly Farms was obliged to bargain with the Unions only concerning the effects of those changes until such time as integration of the transportation employees' unit was completed, but that, since Tyson never had been bound to recognize and bargain with the Unions, that Company had had no responsibility to furnish

the merger agreement or, otherwise, to bargain.

In Nephi Rubber Products Corp., et al.,[29] the Board restated its criteria for determining the existence of a successor relationship as follows:

> (1) Whether there has been a substantial continuity of the same operations; (2) whether the new employer uses the same plant; (3) whether he has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether he employs the same supervisors; (6) whether he uses the same machinery, equipment, and methods of production; and (7) whether he manufactures the same product or offers the same service.

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[29] 303 NLRB No. 19, sl. op. 4, fn. 6.

Also in Nephi Rubber Products Corp., supra,[232] the Board noted that:

> In its review of the principles governing successorship in Fall River Dyeing Corp. v. NLRB,7 the Supreme Court stated: "In conducting the analysis, the Board keeps in mind the question whether 'those employees who have been retained will understandably view their job situations as essentially unaltered.'"8 The District of Columbia Circuit Court of Appeals likewise has explained:
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> > In determining whether the requisite "substantial continuity of the employing industry" exists, courts and the Board typically look to a variety of factors. . . . However, we have also made clear that [t]he essential inquiry is whether operations as they impinge on union members, remain essentially the same after the transfer of ownership. [Citation omitted.] The focus of the analysis, in other words, is not on the continuity of the business structure in general, but rather on the particular operations of the business as they affect the members of the relevant bargaining unit. As recently noted by the Ninth Circuit Court of Appeals, "the touchstone remains whether there was an 'essential change in the business that would have affected employee attitudes toward representation.'"9

The Board has articulated the same concept: "In the successorship situation the events must be viewed from the employees' perspective, i.e., whether their job situation has so changed that they would change their attitudes about being represented."10

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[232] Id. at sl. op. 4-5.

7 482 U.S. 27 (1987).

8 Id. at 43, quoting Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973).

9 Food & Commercial Workers Local 152 (Spencer Foods) v. NLRB, 768 F.2d 1463, 1470 (D.C. Cir. 1985, quoting NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 464 (9th Cir. 1985), quoting Premium Foods v. NLRB, 709 F.2d 623, 627 (9th Cir. 1983). The court's decision in Spencer

Foods, which reversed the Board's dismissal of the 8(a)(5) allegation in that case, subsequently was endorsed by the Board. See Sterling Processing Corp., 291 NLRB No. 30 fn. 9 (September. 30, 1988).

10 Derby Refining Co., 292 NLRB No. 112, slip op. at 3 (Feb. 10, 1989), enfd. sub nom. Coastal Derby Refining Co. v. NLRB, 915 F.2d 1448 (10th Cir. 1990).

Here, noting the parties' above stipulation that, on or about July 18, Tyson had purchased a controlling interest in the stock of Holly Farms, making Holly Farms a wholly-owned subsidiary, and that, since that date, Holly Farms, Inc., and Holly Farms Food Service, Inc.,[233] have been engaged in the same business operations at the same locations

[233] Holly Farms Foods, Inc., and Holly Farms Food Service,Inc., both are fully-owned subsidiaries of Holly Farms Corporation which, as noted, is a wholly-owned subsidiary of Tyson Foods, Inc.

selling the same products to substantially the same customers, and having as a majority of their employees, employees who previously were employees of Holly Farms, in the context of the fact that for the first 2 months thereafter, nothing had changed for those who had been Holly Farms employees, I conclude that there had been no significant occurrence from the standpoint of unit employees affecting their desire for continued representation by the Unions. I, therefor, find that as of July 18, Tyson became Holly Farms' successor and, accordingly, became obligated to bargain with the Union as of that date for the existing drivers-yardmen unit. In so finding, I note that while the above stipulation refers,

by its terms, to the initial continued operation of Holly Farms' business by Holly Farms as an entity distinct from Tyson, that, in fact, was not the case. The record shows that, upon Tyson's assumption of control, key Holly farms executives almost immediately were absorbed into the Tyson organization. Blake Lovette, Holly Farms' president, became, first, president, and then a Tyson senior vice-president and general manager of Tyson Foods Fresh Retail Division; Everett (Skipper) Solomon remained in charge of North Carolina operations, including the Wilkesboro complex, but now for Tyson; A. Gerald Lankford, Holly Farms vice-president for human resources, became manager of human resources, Tyson Foods Fresh

Retail Division; and David Hayes, Holly Farms vice-president, transportation, continued as manager of Tyson Transportation's eastern division. While, as noted, these executives remained in Wilkesboro, with essentially the same duties as before, they performed their duties as part of the Tyson management team and in accordance with Tyson's dictates. When Blake Lovette, just before the August 8 and September 12 negotiating sessions, when major changes affecting the drivers-yardmen unit were announced to the Unions, instructed attorney Hogg as to what to tell the Unions, he did so in consultation with other Tyson officials. Also, since all drivers-yardmen unit personnel were kept on the payroll under

their existing wages, hours and other terms and conditions of employment, I find that, as of July 18, Tyson/Holly Farms employed a substantial and representative complement of former Holly Farms employees.[234]

These findings are consistent with the following discussion of NLRB v. Burns International Security Services, Inc.,[235] in Fall River Dyeing & Finishing Corporation v. NLRB:[236]

> . . . . although the successor has an obligation to bargain with the union, it "is ordinarily free to set initial terms on which it will hire the employees of a predecessor." 406 U.S. at 294, ... We further explained that the successor is under no obligation to hire the employees of its predecessor, subject, of course, to the restriction that it not discriminate against union employees in its hiring. . . . Thus, to a substantial extent the applicability of Burns rests in the hands of the successor. If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of §8(a)(5) is activated. This makes sense when one considers that the employer intends to take advantage of the trained workforce of its predecessor. [Emphasis supplied]

In summary, consistent with the above authority, I find that, since Tyson did not exercise its right to set initial terms and conditions of employment for retained Holly Farms employees different from those previ-

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[234] See NLRB v. Jeffries Lithograph Company, et al., 752 F.2d 460, 464 (C.A. 9, 1985), enfg. 265 NLRB 1499. Also see Memphis-Truck & Trailer, Inc., et al., 284 NLRB 900, 909.

[235] 406 U.S. 272, 80 LRRM 2225 (1972).

[236] 482 U.S. 27, 125 LRRM 2441, 2445-2446 (1987).

ously afforded by Holly Farms, and, as these employees' employment terms and duties during the first 2 months after Tyson took control remained the same, they became established and not subject to unilateral changes. I have found above that nothing occurred during this initial period under Tyson that could have so impinged upon unit employees as to have affected their interest in continued representation by the Unions. I, therefor, conclude that Tyson's obligation, as successor, to bargain with the Unions for the drivers-yardmen transportation unit was activated on July 18 when it acted to maintain the same business as Holly Farms and to retain in place a substantial and

representative complement of that Company's employees.

(b) Accretion

In reaching the aforesaid conclusions, I am not persuaded by the Respondents' argument that the integration of Holly Farms transportation into Tyson after September 22 resulted in the accretion of the existing drivers-yardmen unit into the Tyson transportation system with a result that that unit no longer existed. Rather, in agreement with the General Counsel and Unions, I find that unit continued as separately identifiable.

As noted in Reliable Trailer and Body, Inc.:[237]

> The Court, in NLRB v. Security Columbian Banknote Co., 541 F.2d 135, 140

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[237] 295 NLRB No. 112 (JD 10-11).

(C.A. 3, 1976), defined accretion:

> . . . an accretion is the incorporation of employees into an already existing larger unit when such a community of interest exists among the entire group that the additional employees have no separate unit identity. Thus, they are properly governed by the larger group's choice of bargaining representative.

The Court thereafter indicated the factors which should be considered when resolving accretion issues as:

> . . . integration of operations, centralization of managerial and administrative control and geographic proximity. Also, relevant are similarity of working conditions, skills and functions, common control over labor relations, collective bargaining history and interchangeability of employees [citations omitted].

In concluding that the unionized eastern division transportation drivers currently dispatched from Wilkes-

boro and that division's yardmen, have not lost their separate identities, I note that those employees, under Tyson, continued to constitute a numerical majority of the employees performing those functions at Wilkesboro, Monroe, Temperanceville, Harrisonburg and Glen Allen. Even though the terminals which, under Holly Farms, had corresponded to the aforesaid outlying plants, and at the Wilkesboro complex, were closed by Tyson after integration, those plants principally continued to be served on outhauls by drivers dispatched from the new Wilkesboro terminal. Mostly, these were the same drivers who previously had so served those facilities. These drivers, although currently assigned to longer runs, per-

formed basically the same functions as under Holly Farms, using the same tractors and work skills to deliver, at least on outhauls, essentially the same products. Also, as noted, Tyson had excepted its former Holly Farms eastern division drivers from its rule that drivers must live within a 50 mile radius of their terminals, and had permitted those drivers to reside away from Wilkesboro near the same outlying plants where they originally had been domiciled. Since the takeover, Tyson also has allowed four newly-hired drivers to live near Monroe and Glen Allen, although requiring that most other new hires be domiciled in the Wilkesboro vicinity.

The former Holly Farms transportation eastern division also retained a

separate structural identity within the Tyson organizational structure. David Hayes, who as Holly Farms vice-president for transportation, had had responsibility for that Company's eastern division transportation group, continued at Wilkesboro as eastern division manager, Tyson Transportation, to fill the role of senior resident transportation official. Hayes exercised responsibility for much the same work, personnel and area. Reporting to Hayes were two fleet managers, who filled the functions of the former dispatchers; a shuttle manager who, as noted, assigned local drivers, as had Holly Farms dispatchers; and a manager of outside transportation, which position was filled by a former Holly

Farms head dispatcher, replacing the Holly Farms outhaul manager. The shuttle manager, too, had been brought in from a lead dispatcher's post in Temperanceville, a position and location within the former Holly Farms transportation clerical employees, redesignated by Tyson as dispatch coordinators.

Shuttle drivers, classified by Holly Farms as local drivers, remained within Tyson Transportation, eastern division, and were dispatched from Wilkesboro by the shuttle manager. Where Holly Farms had employed 11 local drivers based at two locations, Tyson had 31 shuttle drivers distributed among four locations. Where Holly Farms had dispatched its local drivers on one-way distances of

100-150 miles, Tyson increased this distance to 250 miles.

Yardmen who, under Tyson, were moved from the transportation department to become plant employees at their former locations, also retained separate identity. They work under transportation coordinators, now also assigned to the plants who, as Holly Farms lead dispatchers, had supervised them before the takeover.[238]

Under Tyson, yard personnel no longer hook up or drop trailers to or from tractors, move tractors and trailers at specified places in the yard, or fuel tractors, which functions currently were performed by

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[238] As noted, the role of Tyson's transportation coordinators was much reduced from when they were Holly Farms dispatchers, but they continued to supervise the yardmen.

drivers. However, as described above, yardmen continued to perform all of their remaining traditional duties while continuing under the supervision of the redesignated former lead dispatchers. Although transferred to the plants, they were not absorbed into the production processes.

The foregoing factors demonstrate that the transfer of yardmen to the plant payrolls was indicative of administrative rather than of functional change.

A particularly significant manifestation of the separate identity of the eastern division transportation group was the arrangement carried forward pursuant to the Tyson/Holly Farms merger agreement of continuing

to provide Holly Farms employee benefits to Tyson's former Holly Farms employees for a period of 2 years after the effective date of the merger. As a result of this arrangement, these employees received the superior Holly Farms job benefits for 2 years while their fellow workers at Tyson did not. As described above, the separate record keeping this process entitled required that Tyson compensate these former Holly Farms employees using Holly Farms paychecks cut in Wilkesboro on the old Holly Farms IBM computer instead of with Tyson checks prepared on Tyson's Sperry Univac computer in Springdale.

These considerations, in the context of the Unions' manifested interest in continuing to represent the

former Holly Farms eastern division long haul and shuttle drivers and yardmen, warrant the conclusion here reached that the unit employees forming the former Holly Farms eastern division transportation group were not accreted to the Tyson transportation group, but have retained separate identity.

However, the western division drivers, after integration, were less separately identifiable than those in the east. The 25 western division drivers employed in early September at Seguin and Center, Texas, were moved to Tyson's new Carthage, Texas, terminal on about October 16, when that terminal opened and 10 more tractors and accompanying personnel were added to the Carthage comple-

ment. In addition to the Carthage facility's proximity to the Carthage, Seguin and Center plants, it also appeared to be the terminal closest to the one other Texas plant; to three plants in Arkansas; and to one plant in Oklahoma. Since outhaul assignments were made from Springdale on a basis of geographic proximity, drivers from the Carthage terminal would primarily serve all of those plants in addition to the plants in Seguin and Center.[239]

As noted, under Holly Farms, there had been administrative differences between the eastern and western transportation divisions. The

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[239] While the Seguin and Center terminals were closed when the drivers were moved to Carthage, the plants at those locations remained open.

eastern division had reported to Holly Farms president through David Hayes as vice-president for transportation, but the western division had so reported, not through Hayes, but through a division vice-president with production responsibilities. The Texas drivers were carried on the payroll of Holly Farms of Texas, Inc., a separate subsidiary from Holly Farms Foods, Incorporated, which paid the eastern division. Also, Holly Farms eastern division drivers were paid a lower maximum mileage rate than in the east.

After September, unlike the eastern division, western division employees did not continue to receive Holly Farms employee benefits and to be paid with Holly Farms pay checks,

cut on the old Holly Farms IBM computer. Instead, like other Tyson employees they were placed under the Tyson benefits program and were compensated by checks prepared on the Tyson Sperry Univac computer and distributed from Springdale.

Nevertheless, the 18 former Holly Farms drivers who were moved to Carthage from Seguin and Center, continued to constitute a clear majority of the relevant employees at that facility and continued to perform the same functions, exercising the same skills using the same equipment. While they, too, in servicing the additional plants in proximity to Carthage and in running extra "legs" to their trips, have spent more time on the road and away from home, they

have remained a recognizable majority group relocated to and concentrated within the new Carthage, Texas, terminal.

I, therefor, find that the drivers-yardmen unit, eastern and western divisions, did not become accreted into Tyson Transportation.

(c) The currently-appropriate drivers-yardmen unit

Having found that Tyson became Holly Farms' successor on July 18 and that the drivers-yardmen unit had retained separate identity and was not accreted into Tyson Transportation and, taking into account the extent to which the affected unit employees have been relocated and reassigned, I find the following redescribed unit to be appropriate:

> All driver employees employed by Tyson/Holly Farms who regularly are dispatched for outhauls through those Companies' terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at those Companies' facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg and Temperanceville, Virginia; and Seguin and Center, Texas;[240] excluding all office clerical employees, guards and supervisors, as defined by the Act.

In accordance with the foregoing, I find that the Respondents, on and since August 8, violated Section 8 (a)(5) and (1) of the Act by refusing to bargain with the Unions concerning their decision to fully integrate the Holly Farms transportation depart-

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[240] The record does not describe what was done with the 10 western division yardmen after integration. This can be resolved in the compliance stage of this proceeding.

ment, western division, into the Tyson transportation system; that, from August 8 through September 12, these Respondents further violated those provisions of the Act by refusing to bargain concerning the unilateral decision to reduce the eastern division by laying off 71 employees and removing 47 tractors. The obligation to bargain concerning those announced reductions was not rendered moot by the Respondents' later unilateral September 12 recission of these reductions. The targeted eastern employees had been notified of their prospective layoffs and the recission was predicated upon and followed by the Respondents' unilateral merger of both divisions into Tyson Transportation. The initially-announced reduc-

tions in eastern division personnel and equipment were mandatory bargaining topics and the unilateral changes in wages, work locations and other terms of employment caused by the merger, in themselves violative of Section 8(a)(5) and (1) of the Act, in turn, led to the constructive discharges of 47 employees.

(d) The 47 constructive discharges

As found above, on September 12, following the negotiating session that day, Hayes, as Holly Farms vice-president for transportation, on Holly Farms stationery, sent copies of the above letter to all Holly Farms transportation drivers advising that all such drivers were being offered employment with Tyson under the Tyson pay plan, but that, as provided in

the merger agreement, Holly Farms benefits would continue to be provided for 2 years to Holly Farms drivers who accepted employment with Tyson. Interested employees were instructed to notify John Sloop by September 22.

The parties stipulated that, consistent with the testimony of long distance drivers Eastridge, Kanupp and Royal, the 47 above-named employees of the 209 drivers who had received Hayes' September 12 letter offering employment, rejected the terms set forth in that letter and did not come to work for Tyson. This was because they did not wish to accept the lesser pay and heavier work schedules then being offered by Tyson. The terms of the September 12 job offer

were explained to recipient drivers by the Respondents' officials during a series of above-described meetings held with these drivers during September, answering the Respondents' argument that the drivers, absent adequate explanation by the Union, had not been sufficiently familiar with the proffered changed conditions to have meaningfully protested.

In Manufacturing Services, Inc.,[341] the Board reiterated the test for constructive discharge:

> First, the burdens imposed upon the employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employees' union activities.

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[341] 295 NLRB No. 31, sl. op. 4.

Applying this standard, the Board has found employees to have been constructively discharged in violation of the Act where, had they accepted the proffered employment, they would have been compelled to give up representation by their union;[242] where the employees would have had to endure a significant adverse change in work scheduling, in compensation[243] and in job benefits.[244]

Had Eastridge, Kanupp, Royal and the others among the 47 Holly Farms drivers accepted the September 12 job offer and remained under the avail-

[242] The Presbyterian Hospital in the City of New York, 285 NLRB 935, fn. 3, 941.

[243] Bronx Metal Polishing Co., Inc., 276 NLRB 299, 305.

[244] S. Freedman Electric, Inc., 256 NLRB 432, fn. 3, 440-441.

able job terms, they would have been burdened by all of the foregoing as resultant from the unilaterally-changed employment conditions. Any one of these changes, the Board has held, would have been sufficiently difficult or unpleasant to cause the constructive discharge of unaccepting employees. Instead of averaging 3-4 days away from home on each trip, while driving about 1,800-2,000 miles per week, as before, the drivers could expect to be away from home an average of 10-14 days/trip, while driving 2,700-3,000 miles/week. At the same time, eastern division drivers' mileage payments could be reduced by 2.75 cents/mile. They also would lose other above-described ancillary payments for drivers' ser-

vices since Tyson had a lesser schedule of fees in connection with stops and deliveries.

The announced preservation of Holly Farms' superior job benefits package was to be temporary—to be discontinued in 2 years. These benefits, which included paid drivers' motel rooms; 8 paid annual holidays at $55/day; paid jury duty and funeral leave; vacations; and medical insurance, were not matched by Tyson. Also, as the Respondents had unlawfully withdrawn recognition from the Unions, these employees would have been required to give up their right to representation by their bargaining agent of choice.

The Respondents' unlawful unilateral changes in working conditions

and their refusal to continue to recognize and bargain with the Unions as their employees' certified bargaining representative converted the above-named employees' refusals to continue to work into constructive discharges in violation of Section 8(a)(5) and (1) of the Act.[245] The Board further has held that "to condition employment upon the abandonment by employees of rights guaranteed them by the Act is equivalent to discharging them outright for union activity."[246] Accordingly, by constructive discharging the 47 above-named employees, the

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[245] Phillip Wall & Sons, Inc., d/b/a Phil Wall & Sons Distributing, 287 NLRB 1161, 1166.

[246] See Block-Southland Sportsmen, 170 NLRB 936, 138; Jo-Vin Dress Company, 279 NLRB 525, 532.

Respondents also violated Section 8(3) and (1) of the Act.

In so concluding, I am not persuaded by the Respondents' arguments that constructive discharge should not be found here since the terms offered to the former Holly Farms drivers were not so difficult or unpleasant as to have forced their resignations, as evidenced by the fact that the great majority of drivers who received the offer accepted; and that the job terms were not discriminatory since they were generally the same as applied to Tyson's other transportation division drivers. As discussed by Administrative Law Judge Maloney in his Board-approved deci-

sion in John Dory Boat Works, Inc.:[247]

> Where, as here, an event or requirement imposes on an employee an onerous or burdensome choice between remaining in employment or acceding to his employer's request and such event or requirement is generated by an employer's union animus, it does not matter how burdensome is the choice or how convenient are the alternatives. If the employee elects to leave under such circumstances, his termination is deemed a constructive discharge . . . . it is not the aggravated nature of choice imposed discriminatorily upon an employee that gives rise to a finding of constructive discharge, but the fact that any such choice was imposed at all for reasons proscribed by the Act.

Accordingly, in the context of the animus, found herein, the Respondents' unlawful conduct in making the

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[247] 229 NLRB 844, 850-851.

unilateral job offers to Holly Farms drivers was not legitimized by the fact that a majority of the unit drivers accepted the "offer." It is not possible to determine how many of the unit drivers who agreed to remain on Tyson's new terms would have done so had they an economic choice. From a standpoint of determining whether discrimination had occurred, under John Dory, supra, it is not relevant, in the context of the Respondent's motivating animus, that the former Holly Farms drivers were retained under the terms and conditions of employment that generally were similar to those of other Tyson drivers.

(e) Direct negotiations with unit employees

I find in further agreement with the General Counsel and Unions that

the Respondents did not meet their duty to bargain, in violation of Section 8(a)(5) and (1) of the Act, in bypassing the Unions and dealing directly with unit employees concerning terms and conditions of employment. This was done both by unilaterally preparing and sending copies of Hayes' above September 12 letter to former Holly Farms drivers offering them positions with Tyson under the lower Tyson pay plan and subject to other above-noted changes in employment conditions, and by the September activities of the Respondents' officials in thereafter meeting with groups of drivers to explain the new employment terms, to answer questions and, generally, to try to sell the new arrangement by direct

discussions with bargaining unit drivers. That this conduct occurred is undisputed.

As noted in Kenosha Auto Transport Corporation:[248]

> It is settled law that an employer runs afoul of the . . . statutory obligation where he bypasses a union which represents his employees and instead deals directly with the employees. See Dallas & Mavis Forwarding Co., 291 NLRB (980, 985) (1988) . . . The gravamen of the violation is that such conduct 'tend(s) to undermine the position of the union' and is subversive of the mode of collective bargaining *** ordained by the Act. See NLRB v. Goodyear Aerospace Corp., 497 F.2d 747, 752 (C.A. 6, 1974), and cases cited therein.

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[248] 302 NLRB No. 148 (JD 17).

(f) The withdrawal of recognition from the Unions

While the parties are in agreement that the Respondents, during the actual September 12 negotiating session, did not withdraw recognition from the Unions as bargaining representative for the drivers-yardmen unit in so many words, it is clear that, in view of the Respondents' announced unilateral changes that day, including plans to merge the Holly Farms bargaining unit completely into the Tyson transportation system, with associated other other unilaterally-imposed changes concerning work locations, rates of pay, work hours and scheduling, future job benefits, and other employment terms, the bargaining to be permitted the Unions would be limited both as to

scope and duration. In this regard, the Respondents, at that meeting, refused to furnish the requested Tyson/Holly Farms merger agreement which, the Unions were informed, contained those Companies' agreement concerning the future of unit employees' job benefits; advised the Unions that Holly Farms, not Tyson, was prepared to continue bargaining, but only as to the impact of the announced unilateral changes upon the employees; and that contract negotiations could continue only until such time as the Respondents considered the old Holly Farms unit to have been completely merged into the Tyson transportation system. After that, the Unions would have lost their majority status and the unit would have

ceased to exist. In subsequent correspondence, described above, the Unions were advised that integration was completed and recognition was withdrawn.

All this occurred during the Unions' certification year.

Administrative Law Judge Evans, in his Board-approved decision in Star Dental Products, A Division of Den-Tal-Ez, Inc.,[249] citing Kimberly-Clark,[250] noted that, to promote industrial peace, "the Board has consistently interpreted the statutory framework to require that its certification of collective bargaining representatives be essentially uncon-

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[249] 303 NLRB No. 148 (JD 4).

[250] 61 NLRB 90.

testable for a period of 12 months."

Judge Evans continued as follows:

> In Brooks v. NLRB, 348 U.S. 96 (1954), the Supreme Court approved the Kimberly-Clark rule stating that a certification based on an election must be honored for a 'reasonable period, ordinarily one year,' in the absence of 'unusual circumstances' such as (1) a schism within the certified union, (2) the defunctness of the union, or (3) radical fluctuation in the size of the bargaining unit within a short period of time. Absent such circumstances, 'self-help,' in the form of a refusal to bargain based on doubts of a union's continuing majority status, is available only after the expiration of the certification year.

The only "unusual circumstance" argued by the Respondents here to justify their withdrawal of recognition from the Unions was the increased size of the drivers' group

after they had merged the drivers unit employees into the larger Tyson transportation system. However, it had been found above that instead of retaining Holly Farms' unit employees under initially different employment terms as it then was privileged to do under Burns, supra, by the time Tyson made the relevant changes, 2 months after the takeover, the existing employment terms had become established and were not subject to unilateral change, either as to the initial decision or as to the effects of such a decision. Therefor, the unilateral changes in pay, work locations, schedules and other terms of employment resulting from the merger,[251]

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[251] Jo-Vin Dress Company, Inc., 279 NLRB 525, 532.

and the merger process, itself, which had increased the size of the unit, were unlawful refusals to bargain.

In so concluding, I note that Tyson took over Holly Farms with full knowledge of Holly Farms' bargaining obligations. The status of bargaining was intensively discussed by Tyson and Holy Farms management during July 14-15 meetings, and such knowledge was carried forward when Tyson brought almost all Holly Farms managers into its own organization. Nor was integration of the two trucking systems a new idea warranting delay. On January 24, about 6 months before Tyson assumed control and while its purchase bid was pending, Tyson vice-president Irwin, at the request of Don Tyson, that Company's

chief executive officer, had drawn up an initial outline for precisely such a merger.

Accordingly, I conclude that the Respondents violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Unions as bargaining representative of the drivers-yardmen unit,[252] particularly since such withdrawal occurred during their certification year.[253]

By unilaterally changing the wages and other terms and conditions of its former Holly Farms drivers and yardmen without giving the Unions an opportunity to negotiate concerning the relevant decisions, Tyson further

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[252] Phillip Wall & Sons, Inc., d/b/a Phil Wall & Sons Distributing, 287 NLRB 1161, 1165-1166.

[253] Star-Dental Products, et al; supra.

violated Section 8(a)(5) and (1) of the Act.[254]

(g) The unilateral changes in job benefits, including retirement

As noted, the Unions were notified during the September 12 negotiating sessions and thereafter that, in accordance with the terms of the Tyson /Holly Farms merger agreement, the superior above-described Holly Farms job benefits package, including the pension plan, would be continued intact by Tyson for its former Holly Farms eastern division employees for 2 years after Tyson's assumption of control.

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[254] Jo-Vin Dress Company, Inc., 279 NLRB 525, 532.

Live haul driver Dimmette[255] testified without contradiction that from the Respondent's December 1989 correspondence and at a January 1980 meeting conducted by personnel manager Mathis, he and other employees were informed by Tyson's management that, in September 1991, about 2 years after the effective date of Tyson's takeover, the Holly Farms pension plan would be terminated and the employees paid off. Although the changes affecting fringe benefits, including pension, for Tyson's former Holly Farms eastern employees were deferred for 2 years, those changes, including the 2 year continuation period, had not been negotiated with

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[255] While Dimmette was a live haul unit, rather than transportation unit employee, his testimony was germane to both groups.

the Unions. This deferred, but unilaterally-imposed change in the duration of the retirement plan and other jobs benefits was violative of Section 8(a)(5) and (1) of the Act.

(h) <u>The refusal to furnish the requested merger agreement</u>

The General Counsel and Unions contend that the Respondents further failed to bargain by refusing the Unions' request that they be provided with a copy of the merger agreement between the two Companies. This request, originally made during the September 12 negotiating session, came after the Respondents had informed the Unions that, in accordance with that merger agreement, fringe benefits for former Holly Farms eastern employees in Tyson's employ would be continued by Tyson for 2 years

after the effective date of the merger agreement.

This arrangement was highlighted in David Hayes' September 12 letter to Holly Farms drivers offering them jobs with Tyson. Hayes' letter specifically informed the drivers that "Fringe benefits currently in effect will be continued for Holly Farms drivers who accept employment with Tyson, as prescribed by the merger agreement."

While the Unions' initial September 12 request was made orally, they repeated their demand for the merger agreement several times thereafter in written correspondence to the Respondents and, in one such letter, offered to enter into a confidentiality agreement concerning that document to

meet any of Tyson's concerns in that regard. It, of course, is the Unions' contention that such information was necessary for the fulfillment of its bargaining responsibilities.

The Respondents answered by repeatedly advising the Unions that they were not entitled to the document. The Respondents' attorney, Hogg, in correspondence, notified the Unions that he had attended negotiating sessions since the Tyson stock purchase only as counsel to Holly Farms and that, since Tyson had no bargaining relationship with the Unions, that Company had no duty to furnish the requested merger agreement. He later advised that Holly Farms, too, had no such obligation as

that company's separate existence had ceased following its completed integration into Tyson during the fall of 1989. Hogg, however, without conceding the responsibility of either Company to provide the merger agreement, included in his October 10 correspondence to the Unions a represented verbatim copy of the relevant merger agreement provision. Accordingly, the Respondents, while continuing to deny any duty to furnish the merger agreement, itself, contend that the issue is now moot as the relevant language of the merger agreement had been given to the Unions.

The General Counsel and Unions, asserting the Unions' entitlement to receive the entire merger agreement, reject the adequacy and timeliness of

the provision set forth in Hogg's October 10 letter.

Administrative Law Judge Zankel, in his Board-approved decision in New England Newspapers, Inc., d/b/a Transcript Newspapers,[256]

> . . . . An employer's duty to bargain in good faith includes the obligation to provide information needed by a bargaining agent for the proper performance of its duties. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). The right to receive information arises by operation of the Act itself, on an appropriate request and the scope of the right is limited only by considerations of relevancy. Ellsworth Sheet Metal, 224 NLRB 1505, 1507 (1976). In Bohemia, Inc., 272 NLRB 1128, 1129 (1984), the Board observed:
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> > [A]n employer must provide a union with requested information "if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative." Associated General Contractors of California, 242 NLRB 891, 893 (1979), enfd. 633 F.2d 766 (9th Cir. 1980); NLRB v. Acme Industrial Co., 385 U.S. 432 (1967). The Board uses a liberal, discovery-type standard to determine whether information is relevant, or potentially relevant, to require its production. NLRB v. Truitt Mfg. Co., supra. Information about terms and conditions of employment of employees actually represented by a union is presumptively relevant and necessary and is required to be produced. Ohio Power Co., 216 NLRB 987 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976).
>
> Requested information that is not so apparently related to a union's bargaining obligations is not presumptively relevant. In such situations, there must be a demonstration of relevance. NLRB v. Rockwell Standard Corp.,

[256] 286 NLRB 124, 128, enfd. 856 F.2d 409 (C.A. 1, 1988).

410 F.2d 953, 957 (6th Cir. 1969). Information not presumptively relevant nonetheless may have an "even more fundamental relevance that than considered presumptively relevant." Prudential Insurance Co. of America v. NLRB, 412 F.2d 77, 84 (2d Cir. 1969). Not all relevant information need be disclosed. If the information is of a confidential nature, it may be withheld until appropriate safeguards are provided. Detroit Edison Co. v. NLRB, 440 U.S. 301, 314 (1979).

In agreement with the General Counsel and Unions, and in accordance with the above authority, I find that the merger agreement is the most authoritative and reliable source concerning what Tyson and Holly Farms had agreed regarding continuation of Holly Farms job benefits for former Holly Farms employees in Tyson's employ and that the single provision from that agreement later quoted to the Unions was inadequate. The pro-

vision, as set forth in Hogg's October 10 letter, is difficult to decipher apart from the overall agreement. In this regard, language in the quoted provision that "following the Effective Time, the Surviving Corporation will provide for a period of two years after the Effective Time employees of the Company (excluding for purposes of this Section 5.8 employees covered by collective bargaining agreements or who are members of a collective bargaining unit or labor union) with employee benefits . . . . which are no less favorable in the aggregate than the employees benefits provided . . . . for such employees by the Company as the date hereof," raises other questions. These include (1) whether the paren-

thesized phrase, on its face, precludes employees from receiving the continued employee benefits if those employees were members of a collective-bargaining unit or a labor union and (2) what was the actual date of the merger agreement. With respect to the first question, it would appear from the language used that, contrary to the testimony and representations, including those made to Holly Farms drivers in the September 12 written job offers, that Section 5.8 of the merger agreement did not apply to employees who belonged to a bargaining unit or union, which, at least, raises the possibility that such employees, to receive the benefits, might have been qualified under some other provision in that docu-

ment. It, of course, also would be necessary to obtain the date of the merger agreement to determine the precise date for the expiration of those benefits.

Also, as in Transcript Newspapers, supra,[257] the merger agreement "struck at the core of the employment relationship of the unit employees represented" by the Unions because it may well have been "the base instrument" defining the relationship between Tyson and Holly Farms and containing other agreements affecting employees. Arguably, all of the Unions' problems in representing this unit since August can be traced to the merger agreement. As in Transcript Newspapers, noting that the

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[257] Id. at 128.

merger agreement could have established each Company's role in the continued operation of the business; future operating plans and the status of fringe benefits for unit employees, who expressly were excluded from the coverage of the provided paragraph, I find that the entire merger agreement was necessary to enable the Unions to formulate intelligent and comprehensive bargaining proposals in fulfillment of their responsibilities as representative.[258]

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[258] In concluding that the Unions are entitled to receive the complete merger agreement, I do not presume that the parties would be unsuccessful in reaching a mutually satisfactory agreement regarding the Unions' offer of confidentiality to be afforded that document. However, since the Respondents' refusals to supply that document were based upon their position that the Unions simply were not entitled, rather than upon confidentiality, any future inability of the parties to arrive at a confidentiality agreement should not relieve the Respondents of their duty to furnish the merger agreement.

Accordingly, I find that the Respondents' refusal to comply with the Unions' requests for a copy of the entire merger agreement between them was in violation of Section 8(a)(5) and (1) of the Act.

3. Tyson's duty to remedy Holly Farms' unfair labor practices

I find that Tyson, as successor, has the responsibility of remedying Holly Farms' unfair labor practices occurring prior to July 18, found above, because management representatives Blake D. Lovette, Everett (Skipper) Solomon, A. Gerald Lankford, David Hayes, Barbara Mathis, David Fairchild, Sam Whittington, Ray Lovette, Larry Church, Al Bare, John Sloop, Bob Absher, and others, moved from Holly Farms to Tyson with full

knowledge of Holly Farms' unfair labor practices.[259]

4. The alleged unfair labor practice strike—facts and conclusions

The General Counsel and Unions contend that a strike that began on October 1 among former Holly Farms drivers, represented by the Unions, was an unfair labor practice strike caused and prolonged by the unlawful and unremedied conduct of Holly Farms before July 18 and of Tyson since that date.

The Respondents argue that the evidence concerning the reasons for the strike was too confused and/or inadequate to show that the strike was caused or prolonged by unfair

[259] Memphis Truck and Trailer, Inc., et al., 248 NLRB 900.

labor practices and emphasize that the strike, in any event, could not have been an unfair labor strike because it was not called in accordance with the Unions' bylaws. In this regard, the Respondents assert that the evidence does not show that a sufficiently large number of bargaining unit employees participated in the strike vote to have enabled the strike to be authorized in accordance with the bylaws. Although the seven Teamsters local unions were certified to jointly represent the drivers-yardmen unit, the record contains evidence of a strike vote taken only by Local 391.

Local Union No. 391 business agent Reuben W. Brown[260] described the events leading to the strike.

Brown related that, on August 12, pursuant to notices issued to the drivers and yardmen 4 days earlier by Bruce Blevins, Local 391 secretary-treasurer, a strike vote meeting of those employees who, in Wilkesboro, were represented by Local 391 was held at a local motel. This was attended by 66 unit employees.

Secretary-treasurer Blevins opened the August 12 meeting by reviewing and explaining to the membership the Respondents' negotiating proposals that had been given to him as union

[260] Brown, an officer of Local 391 since 1968, was in charge from inception of the Unions' organizing campaigns for the different units at Holly Farms.

spokesman during the then-recent negotiating sessions of August 8, 9 and 10.[261] At Blevins' request, Brown then read aloud every allegation of the latest consolidated complaint in this matter, which he had distributed to the employees as they came in. When he finished reading the complaint, Brown told those present that, in his opinion, the violations alleged were substantial and, in effect, that because of the nature and severity of the violations, a strike in response would be an unfair labor practice strike. Brown referred to a Section 10(j) injunction

[261] As noted, during those negotiating sessions, the Unions were notified of the Respondents' plans to unilaterally merge Holly Farms' western transportation division into its own larger system and to lay off 71 drivers and eliminate 47 tractors from the eastern division.

that Counsel for the General Counsel then was seeking.[262]

Blevins then resumed the floor, telling the others present that before a strike vote could be taken, at least 50 percent of the eligible voters in that area would have to be available. He reiterated Brown's point that the complaint allegations were so severe that the Union would have to call an unfair labor practice strike, but told the group that the Union, at that time, only was seeking authorization from the employees to call a strike when the Union considered appropriate. Blevins overruled

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[262] The subject matter before the U.S. District Court, Nashville, Tennessee, in the Section 10(j) injunction proceeding related the above-considered discharges of Bouchelle, Barker, Huffman and Richardson, and included Richardson's disputed status as a supervisor. That matter was resolved by a Court order issued October 26.

a motion for a stand-up vote, declaring that the vote would have to be taken by secret ballot. The ballots then were distributed, marked and counted. The tally showed that 63 employees voted to authorize a strike, none opposed, with 3 abstentions.

Although the Teamsters International Union bylaws provided that, while a simple majority of 50 percent plus 1 vote would suffice to authorize rejection of a proposed contract, a two-thirds majority vote would be necessary in order to both reject a proposed contract and authorize a strike. Since Brown had information only about the 66 employees who participated in the Local 391-sponsored vote on August 12, he could not tes-

tify as to whether the employees represented by the 6 other Teamsters locals which, jointly with Local 391, represented the overall unit, also had voted to authorize strike action.[263] Therefor, the record contains no evidence that two-thirds of the employees in the relevant unit had voted to support a strike to be authorized in conformity with the International Union's bylaws.

Brown also described certain relevant later meetings called by Local 391, which also led to the strike. One such meeting of Local 391 officials and mostly Wilkesboro-based

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[263] As noted, the six other Teamsters locals certified jointly with Local 391, based in Kernersville, North Carolina, were: Local 29 in Harrisonburg, Virginia; Local 71, Monroe, North Carolina; Local 355, Baltimore Maryland; Local 592, Richmond, Virginia; Local 657, Seguin, Texas; and Local 988, Center (Houston), Texas.

employees took place on September 16, following the controversial September 12 negotiating session. Present were Local 391 president R. V. Durham; secretary-treasurer Blevins; the Unions' attorney, J. David James; Doug Norris, a business representative; and Murl Kelly, chairman of the Unions' negotiating committee. Also present were about 60 drivers and yardmen from Wilkesboro and 2 unit employees from Monroe. Durham and Blevins described what generally had taken place during negotiations, with Durham focusing on what had occurred during the September 12 session. Before Brown, who described the session, was obliged to temporarily leave the meeting, he heard Durham introduce attorney James who began to

speak of the legal ramifications. When Brown returned, the meeting was over. The only decision then taken was that, as James recommended, the employees should show up to work for Tyson.

At the September 25 meeting of Blevins, Brown and Kelly, it was agreed that Brown should get some of the employees together to find out if the employees still were as willing to strike as when the August 12 vote was taken. Brown complied, checking with a number of employees.

On the morning of September 30, Brown met with seven of the Respondents' employees and several union officials expected to be present when the picket line was set up. Brown told the group that he had a permit

approved by the chief of police that the strike go forward on October 1 at 12:01 a.m. The strike commenced on schedule.[264]

I find no merit to the Respondents' argument that the strike that began on October 1 was not an unfair labor strike because not authorized by a two-thirds vote, as required by the International Union's bylaws. The principle that a Union in a bargaining relationship is the only party to determine whether its relevant internal rules have been fulfilled was expressed in North Country Motors, Ltd.[265] In North County Motors, supra, the Respondent Employer,

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[264] No unconditional offer to return to work and end the strike was made before the conclusion of the hearing.

[265] 146 NLRB 671, 674.

in defending against the Union's contention that it had failed to bargain by refusing to sign a fully-negotiated, duly-ratified collective-bargaining agreement, argued that, contrary to the Union's bylaws, the Union had failed to obtain appropriate ratification. The Union, in fact, had had difficulty in obtaining ratification. After the employees twice had voted to reject an earlier tentative contract, the parties conducted further negotiations and reached a revised agreement which the Union business agent optimistically had predicted to the Employer would be ratified. However, only one member of the nine employees unit attended either of the two meetings the business agent thereafter had called

to obtain ratification. Finally, only that employee voted, and his ratification of the agreement was cited to the Respondent, over its objection, as fulfillment of that prerequisite.[266] In finding that the Respondent had violated the Act by refusing to sign the negotiated contract, the Board held:

> . . . we cannot agree . . . . that the one vote ratification was in conflict with the policies of the Act. The Act imposes no obligation upon a bargaining agent to obtain employee ratification of a contract it negotiates in their behalf. In a case such as this, the requirement for ratification could only have been one which the Union itself assumed. It was thus for the Union,

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[266] In North Country Motors, supra, the Union's bylaws provided for ratification by "a majority vote of those present and voting at the meeting." The International Union's constitution contained a similar provision.

> not for the Respondent, to construe the meaning of the Union's internal regulations relating to ratification. Whether the one-vote ratification in the circumstances here present was enough to satisfy the Union's bylaw requirement for 'approval by a majority vote of those present and voting at the meeting' was a matter for the Union to decide, and not for the Respondent to challenge once assured by the Union that the latter's ratification requirements had been met.

Here, the right of the Respondents, jointly and separately responsible for many unfair labor practices, to properly determine whether the Unions had sufficiently complied with their bylaw provisions so as to conduct a valid strike in protest of the Respondents' own unlawful conduct, would appear to be even more remote than in North Country Motors.

As in that case, the Unions' internal rules for authorizing strikes are their own affair, are not binding on the Board in determining whether, in fact, an unfair labor practice strike has occurred, and such internal rules certainly were not intended to provide refuge for the party whose unlawful conduct had precipitated the strike in the first place.

As the record shows that the strike occurred pursuant to a duly-noticed strike vote at a meeting called for that purpose; that the vote to authorize strike action was taken against the background and in protest of the Respondents' unlawful conduct; and that the great majority of those in attendance voted in favor, I find that the strike that be-

gan on October 1, in which about 40 drivers joined,[267] was an unfair labor practice strike, caused and prolonged by the Respondents' unfair labor practices.

5. Refusals to bargain concerning the live haul unit

(a) The size and composition of the unit

As noted, in accordance with the Board's Decision on Review and Order, dated July 20, 1989, in Case 11-RC-5583 partially reversing his June 20 Supplemental Decision and Direction

[267] Since several of the 47 above-named drivers, found above to have been constructively discharged on September 22, testified that they joined the strike when it began on October 1, their testimony may have increased the perceived number of strikers. Actually, the dischargees, who had been terminated before the start of the strike, retained their status as unlawfully terminated dischargees and did not later become strikers since, by October 1, they already had been removed from the payroll. Determination of the strikers' identities, if relevant, should be left to the compliance stage of this proceeding.

of Election in that matter, the Regional Director found the following unit appropriate for purposes of collective bargaining:

> All live haul (chicken catching crews) employees employed at the processing facility of Respondents located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at the facility of Respondents at Roaring River, North Carolina, excluding all office clerical employees, guards and supervisors, as defined in the Act.

The Respondents maintain, as they have during the course of Case 11-RC-5583, that the live haul employees cannot appropriately be included in a Board-found bargaining unit because they are agricultural workers, exempt under Section 2(3) of the Act. In the alternative, the Respondents ar-

gue that, if the live haul workers are not held to be agricultural, then the above-described unit still would be inappropriate because their approximately 2,000 Wilkesboro production workers were not also included.

I, of course, am bound by the Board's prior determination that the unit as described is appropriate.[268]

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[268] In accordance with the Respondents' position that the live haul employees should be excluded from the unit because they were exempt agricultural workers, and with the requirements of the subsequent decision in Camsco Produce Company, Inc., 297 NLRB No. 157, sl. op. 11, where the Board determined that it would "assert jurisdiction if any amount of farm commodities other than those of the employer-farmer are regularly handled by the employees in question," the parties entered into the following stipulation concerning the Respondents' live haul operations:

The live-haul department, meaning catchers and drivers, catch Company-owned chickens at the grow-out farms and deliver those chickens to the processing department at the Wilkesboro processing plant. The grow-out farms have contracts with Holly Farms to grow the Holly-owned chickens. All chickens caught and transported by live haul from the farms to the plant are owned by Holly Farms. On

(continued...)

(b) Majority status

In accordance with the parties' stipulation, I find that on March 31,

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[268](...continued)
occasion, Holly Farms buys live chickens from other producers of chickens not associated with Holly Farms that are caught and transported by Holly Farms live-haul from the outside source to the processing plant. The last time this occurred was October 1989 when Holly Farms bought approximately 60,000 chickens. During 1989, Holly Farms live haul caught and transported a total of approximately 575,000 chickens from these outside sources spread over seven separate occasions. These were processed by the Wilkesboro processing plant. This outside purchasing was done when the processing plant ran short of chickens and when another producer had extra chickens. However, normally, when Holly Farms was short of chickens, so was the rest of the industry.

Holly Farms also buys approximately 2,000 grown chickens a month from Pilch, which are hauled by Pilch to the processing plant in Wilkesboro. Live haul does not catch or haul these chickens with the exception that on January 23, 1990, one live haul truck with a forklift picked up chickens from Pilch and hauled them to the processing plant. No catchers were involved. This will not occur again because it cost Holly Farms more to pick up those chickens than can be earned on them.

During 1989, Holly Farms killed and processed approximately 96 million chickens at its Wilkesboro processing plant, which includes the approximately 575,000 purchased from outside sources that were transported by Holly Farms live haul.

the date when the complaints, as amended, allege that Local 391 had achieved majority status in the live haul unit, that Union had 103 signed and dated authorization cards received from among the 201 employees then in the unit. Noting that the stipulation also affirms the authenticity of the signatures and dates on those cards, I conclude that on the critical date of March 31, a majority of employees in the bargaining unit had freely authorized Local 391 to represent them by signing unequivocal authorization cards.[269]

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[269] The authorization cards obtained by the Union included blank lines for theemployee's name, home address, telephone number, employer, employment date, city and state of employment, date of birth, social security number and date of application. The authorization card's heading and text, shown below, were followed by an employee signature line:

(continued...)

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[269](...continued)

APPLICATION FOR MEMBERSHIP IN LOCAL UNION NO. 391 Affiliated with the International Brotherhood of Teamsters Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO

* * *

I, the undersigned, hereby apply for admission to membership in the above Union of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, and voluntarily choose and designate it as my representative for purposes of collective bargaining, hereby revoking any contrary designation. I authorize my employer to deduct from my wages and to pay to any authorized representative of Local Union 391 all sums as shall be certified by Local Union 391 to be paid in consideration of the representation provided to me by Local Union 391.

This authorization and assignment shall be irrevocable for a period of one year from the date of execution or until the termination of the agreement between the Employer and Local Union 391, whichever occurs sooner, and from year to year thereafter, unless not less than thirty (30) days and not more than forty-five (45) days prior to the end of any subsequent yearly period I give the Employer and the Union written notice of revocation bearing my

(continued...)

(c) The applicability of a bargaining order

Having found that on March 31, Local 391 represented a majority of the Respondents' live haul employees because of the employees' execution of authorization cards which, on their face, duly designated that Union as their exclusive representative for purposes of collective bargaining with the Respondents, it has been concluded that the Union was validly selected by a majority of the Respondents' employees as their exclusive bargaining representative in a bargaining unit found appropriate

[269](...continued)
signature thereto. This authorization shall go into effect immediately or upon ratification of a collective bargaining agreement if one is not presently in effect: Union Dues not deductible as charitable contributions for Federal Income Tax purposes.

by the Board. The Union's subsequent loss of its majority status is not controlling for it must be presumed that, but for the Respondents' unfair labor practices, that majority status would have been retained.

In considering whether a bargaining order was warranted to remedy an employer's unfair labor practices, the Board, in Koons Ford of Annapolis,[270] restated the applicable rule of NLRB v. Gissel Packing Co.:[271]

> In Gissel, the Court delineated two types of situations where bargaining orders are appropriate: (1) 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices; and (2) 'less extraordinary' cases marked

[270] 282 NLRB 506, 507, enfd. 833 F.2d 310 (C.A. 4, 1987), cert. denied ___ U.S. ___, 128 LRRM 2144 (1988).

[271] 395 U.S. 575 (1969).

by 'less pervasive' practices.'5 Thus, the court placed its approval on the Board's use of a bargaining order in 'less extraordinary' cases where the employer's unlawful conduct has a 'tendency to undermine [the union's] majority strength and impede the election processes.6 The Court indicated that when the unfair labor practices are less flagrant and the union at one time had a majority support among the unit employees the Board may consider

> the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.7

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5 Gissel, supra at 613-614.
6 Id. at 614.
7 Id. at 614-615.

In finding that a bargaining order is justified in the present matter, I conclude that the Respondents' unfair labor practices would come within the second Gissel category, described above.

Affecting the live haul unit, the record discloses numerous instances during which the Respondents' officials in the Wilkesboro complex, including A. Gerald Lankford, Holly Farms' vice-president for human resources; Sam Whittington, the live production manager; Ray Lovette, the live haul manager; David Minton, a live haul superintendent; Barbara

Mathis, the personnel manager; and Dean Grimes, a live haul dispatcher/ supervisor, variously threatened to cause the arrest of any employees caught distributing union literature in non-work areas on Company property during non-work time; maintained and enforced an unlawfully broad no access/no distribution rule prohibiting union activities in non-work areas of Company property during non-work time; granted an unlawful pay raise 4 weeks before the representation election; threatened an employee-union activist with discharge; gave the same employee a written warning and threatened yet another employee that this activist employee would be terminated; repeatedly interrogated employees concerning their union sen-

timents; repeatedly solicited, promised to remedy, and actually remedied, employees' grievances by expanding the workweek; impressed employees with the futility of supporting the Union; informed employees that if the Union were selected as bargaining representative, the Company would know how they had voted; inhibited and threatened unspecified retaliation for wearing union insignia; discriminatorily removed and excluded union materials from Company live haul department bulletin boards; and, after the election, announced that the Respondents unilaterally would end the Holly Farms pension plan for live haul and transportation department unit employees at a specified later date.

As in J. J. Newberry Co., a wholly-owned Subsidiary of McCrory Corporation,[272] the Respondents' grant of substantial economic benefits in violation of Section 8(a)(1) of the Act, such as the wage increase and the expanded workweek,[273] are hallmark violations "sufficient to render it unlikely that a fair election could be held. Thus the Board has long recognized that employees are not likely to miss the inference that 'the source of all benefits now conferred is also the source from which

[272] 249 NLRB 991, 993, enfd. in rel. part denied 645 F.2d 148 (C.A. 2, 1981). Also see Pembrook Management, Inc., 296 NLRB No. 143, sl. op. 8, citing Honolulu Sporting Goods Co., 239 NLRB 1277, 1282, and Tower Records, 182 NLRB 382, 387.

[273] As noted, in May, the workweek had been increased from 4 to 5 days in the effort to remedy grievances Ray Lovette had unlawfully solicited from live haul drivers.

future benefits must flow and which may dry up if not obliged.' N.L.R.B. v. Exchange Parts Company, 375 U.S. 405 (1964) [other citations omitted]." Here, the Respondents' granting of unlawful economic benefits were only two of numerous unfair labor practices directed at live haul unit employees and intended to undermine the Union's majority status. Accordingly, even without regard to the Respondents' unlawful conduct affecting its employees outside of the live haul unit, I find that a bargaining order is necessary and justified to protect the majority sentiment expressed through authorization cards and to remedy the violations committed.

However, concurrently with its anti-union campaign among the live haul unit employees and also affecting them, the Respondents committed serious violations of the Act against neighboring employees based in the same Wilkesboro complex who belonged to the drivers-yardmen unit and others who were plant workers. Respondents' officials responsible for such violations occurring before the July 27 live haul election included Blake D. Lovette, Holly Farms' president and chief operating officer; David Hayes, vice-president for transportation; A. Gerald Lankford, vice-president for human services; Larry Church, chief of security; Bob Absher, head dispatcher; John Sloop, driver-coordinator; and Murl Murphy,

supervisor/dispatcher.[274] These individuals, between them, repeatedly threatened unit drivers that, whether or not they chose the Unions to represent them, Holly Farms trucking operations would be discontinued, the trucks sold, the hauling service contracted out and their jobs lost; maintained and discriminatorily enforced unlawfully broad no access/no distribution rules; threatened to arrest six off-duty employees for engaging in union handbilling in non-work areas on their own non-work time; caused the arrest and issued written warnings to three employees

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[274] As noted, all of the aforesaid Holly Farms officials accepted generally comparable positions with Tyson, except that Sloop was promoted to an even more responsible position as Tyson's manager, personnel and safety, Wilkesboro.

for engaging in such activities; threatened employees with unspecified reprisals for having supported the Unions; discriminatorily discharged four plant employees for having engaged in union activities; and prohibited a plant employee from discussing his pay rate with fellow employees.

The Respondent's conspicuous unlawful conduct affecting neighboring employees in the drivers-yardmen unit continued after the live haul election and the Tyson takeover. Such activities included the Respondents' unilateral merging of the eastern and western divisions of the existing drivers-yardmen unit into the Tyson transportation system; the Respondents' unilaterally-imposed reloca-

tions and changes in the wages, hours and other terms and conditions of employment affecting employees in that unit; the withdrawal of recognition from the Unions during their certification year as bargaining representative; the bypassing of the Unions and direct bargaining with those employees; and the constructive discharges of 47 drivers who declined to accept the Respondents' unlawful unilaterally-imposed employment terms. Such post-election conduct tactically positioned the Respondents to gain an advantage in the event of a new election, reducing the efficacy of such an election.

The Respondents, however, argue that in determining the applicability of a bargaining order for the live

haul unit, only unlawful conduct directed at employee members of that unit should be considered and that, therefor, their actions affecting employees within the drivers-yardmen unit or those who worked in the plant is not germane. While, admittedly, most Gissel bargaining orders are issued on the basis of unlawful conduct directly affecting employees of the subject unit, this is not necessarily the case.

In J. P. Stevens, Inc.,[275] in the context of repeated, aggravated violations found in the series of cases involving that Company, the Board held that it was appropriate to extend the bargaining order issued in

[275] 239 NLRB 738, 770-771, enfd. in rel. part 623 F.2d 322 (C.A. 4, 1980).

that matter to all J. P. Stevens facilities where the Union's representative status already had been established. This provided a remedy of corporate-wide scope unlimited by proof that employees in other of that Company's facilities, who might be affected by the bargaining order, actually knew of or were affected by the specific unfair labor practices that had led to the issuance of the bargaining order in the adjudicated matter. In providing this broader remedy in J. P. Stevens, supra, it was noted that:

> . . . the plants were contiguous; that since the policies which gave rise to the unfair labor practices were centrally developed, there 'was every reason to believe that if not deterred, [the Company] would pursue the same discriminatory policies throughout

> the region;' and that 'the Company's practices were so extensive and so well publicized that they must inevitably have had a coercive impact at the remaining plants.' [citations omitted]

While the Respondents' conduct in the present matter, of course, differs from that described in the J. P. Stevens series, the Respondents here, nonetheless, have engaged in numerous unfair labor practices of the most serious nature, pervading the Wilkesboro complex and beyond. Although enacted in a smaller, more localized setting that were the J. P. Stevens cases,[276] the Respondents' conduct, principally affecting employees in

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[276] J. P. Stevens, Inc., had more than 40 plants scattered throughout several states.

the Wilkesboro complex, was intensely concentrated.

As in J. P. Stevens, supra, at the Wilkesboro complex, the live haul facilities were contiguous with the plants and, before the autumn merger of trucking operations, live haul also was contiguous with the nucleus of the eastern division transportation department. Labor relations policies always were centrally controlled. Before tyson, Holly Farms' labor policies were governed from Wilkesboro by Blake Lovette and Lankford, assisted by personnel manager Mathis. After the takeover, such policies became centrally controlled from Springdale, with local substantial input from Lovette and Lankford, who continued to function for Tyson

in much the same way. The Respondents' unilateral merger of the former Holly Farms transportation division into the larger Tyson transportation system; the relocation of the Wilkesboro terminal and persons employed there; the attendant changes in the affected employees' wages and working conditions; the constructive discharge of 47 drivers resulting from those unilateral changes and the Respondents' abrupt withdrawal of recognition from the Unions during their certification year, were overt, conspicuous and highly publicized actions by, perhaps, the area's largest employer.

The Respondents did not try to conceal from live haul employees their unlawful conduct affecting em-

ployees in other units. When, as found above, Lankford, in the first week of April, told at least one meeting of live haul employees that there would be no union handbilling on Company property, that three employees had been arrested for engaging in such activities and that he did not need any more arrests, he, of course, was referring to the arrests of Branscome, Hester and T. R. Hayes of the drivers-yardmen unit. When that incident occurred, the unions already had been certified as representative of the drivers-yardmen unit and the three drivers were assisting Local 391 in organizing other groups of employees. Accordingly, when Lankford, to discourage support for the Union, attempted to gain addi-

tional impact from the arrests of the three drivers by mentioning the incident to live haul employees, he not only crossed unit lines, himself, to describe to live haul employees what Holly Farms had done to its other employees for handbilling and, likewise, was prepared to do to them should they engage in such conduct, but also informed the live haul workers of the existence of the unlawfully broad no access/no distribution rule that was being enforced on Company property. As found above, in that same time frame, plant employee Dowd also was told of these arrests by a security guard as she walked through a Company parking lot holding union authorization cards in her hand. The guard, as found above, was

acting as a Company agent when he spoke to Dowd.

It, therefor, is not reasonable to assume, as urged by the Respondents, that the live haul employees, at the time, were ignorant of the Respondents' unlawful conduct occurring on parking lots and in the complex around them, and which, in instances, was called to their attention by members of management for the Respondent's own purposes.[277]

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[277] J. P. Stevens, Inc., 247 NLRB 400, 492, cited by the Respondents, is inapplicable. That case merely denied the General Counsel's request for a prospective bargaining order that would cover future bargaining requests anywhere in that Company's extensive enterprise should the Union secure a card majority or certification at any Stevens' facility. Even though J. P. Stevens had shown a pronounced disposition to violate the Act, the Board simply held that each requested Gissel bargaining order must be assessed on its own merits. This J. P. Stevens case differed from the earlier J. P. Stevens case, cited by me where the bargaining order was not prospective since extended only to other

(continued...)

Contrary to the Respondents, I do not find it significant that the Union has not formally requested the Respondents to recognize and bargain with it with respect to the live haul unit. When, on February 15, the Union, in a letter from organizer R. W. Brown to Holly Farms president Blake D. Lovette, did request recognition for a larger unit that the Union then considered appropriate[278] and had asked for an opportunity to demonstrate its card majority, the Respondents did not reply. Since then, the Respondents, unlike the

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[277](...continued)
facilities where the Union's representative status already was established.

[278] The Union, on February 15, had requested recognition for hatchery, live haul and feed haul employees at Wilkesboro, North Wilkesboro and Roaring River, North Carolina, and at four other locations.

Union, have continued to contest the appropriateness of the unit later found by the Board. The Respondents have made plain that they will continue to litigate the composition of the live haul unit, that they will not grant voluntary recognition to the Union; and, as found above, the Respondents have sought to counter the Union's organizational efforts by numerous unlawful acts.

Accordingly, the absence of a proper demand for recognition and bargaining does not foreclose the propriety of a bargaining order as a remedy for the Respondent's unfair labor practices,[279] and the absence

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[279] Color Tech Corporation, 286 NLRB 476.

of such a demand here can be excused as futile.[280]

Without regard to whether, as the Respondents seek to argue, employee turnover has sufficiently cured the effect of any employer misconduct so as to allow the conduct of a fair election,[281] such evidence would not remove the bases for a bargaining order. The unlawful conduct in this matter was participated in by the Respondents' highest officials, all of whom, at the time of the hearing, were still in either the same, or in substantially equivalent, positions.

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[280] Westinghouse Broadcasting and Cable, Inc., 285 NLRB 205, 214.

[281] At the hearing, consistent with Highland Plastics, 256 NLRB 146, 147; The Salvation Army Williams Memorial Residence, 293 NLRB, supra, at 944-945; International Door, Inc., 303 NLRB No. 94, sl. op. 6, the Respondents' proffered evidence concerning employee turnover was rejected.

Aspects of the Respondents' unlawful conduct also were directed at virtually every employee in the unit and, as noted, also at other groups of employees contiguous to the live haul unit. As the ranking members of management and virtually all supervisors and agents who were involved in the unfair labor practices still are in place and continue in charge of the Respondents' relevant operations; as the scope of their unfair labor practices show that the Respondents, through them, are firmly committed to their anti-union positions from which they are unlikely to retreat; and as these unfair labor practices were numerous, egregious and pervasive, it is foreseeable that new employees would learn of past practices and

also be deterred from seeking union representation.

Although time has passed since the Respondents' pattern of unlawful activity, the Board and courts have found that where, as here, the Respondents' unfair labor practices have been serious and pervasive and that conduct which could adversely influence employees in their freedom to choose a collective bargaining representative continued even after the representation election, the lasting effects of such conduct cannot be eradicated by the mere passage of time. While passage of time is regrettable, it is not a sufficient

basis for denying a bargaining order.[282]

From the many serious violations found, I conclude that the possibility of ending the effects of the Respondents' unfair labor practices and of conducting a fair election by the use of traditional remedies is slight. Requiring the Respondents simply to refrain from such conduct will not eradicate the lingering effects of the violations and an election will not reliably determine genuine, uncoerced employee sentiment. Therefore, I find that the employees' sentiments concerning representation, expressed here through authorization cards, would be better protected by

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[282] Quality Aluminum Products, 278 NLRB 388, 340, enfd. 813 F.2d 795 (C.A. 6, 1987).

issuance of a bargaining order than by traditional remedies.

Accordingly, the Respondents should be required to bargain with the Union as the duly designated representative in the live haul unit found appropriate, as of April 3, 1989,[283] the date the Respondents embarked on a clear course of unlawful conduct after the Union had acquired authorization cards from a majority of employees in the unit.[284]

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[283] On about April 3, live haul manager Ray Lovette began his series of meetings with live haul drivers during which he unlawfully interrogated them and solicited and promised to remedy their grievances.

[284] Color Tech Corporation, 286 NLRB, supra, at 478.

E. The Challenged Ballot and Objections to the Election in Case 11-RC-5583

(1)(a) The challenged ballot of Tony L. Clark—facts

At the election, the Board agent challenged the ballot of Tony L. Clark on the ground that his name did not appear on the voting eligibility list. Other ballots cast also were challenged on assorted grounds with a result that the challenged ballots were determinative. However, by early December, the challenges to all cast ballots, except that of Clark, had been resolved. The challenges to some ballots were sustained, but the challenges to 3 ballots were overruled and those ballots were opened, counted and a revised Tally of Ballots issued. The Revised Tally of Ballots showed that 95 votes had been

cast for and that 95 votes had been cast against the Petitioner, Local 391, and that it would be necessary to decide the sole remaining unresolved challenged ballot, that of Clark, in order to determine whether the Petitioner had obtained a majority of the valid votes cast in the election and, accordingly whether Local 391 should be certified as bargaining agent.

As noted, the Union asserts that Clark was eligible to vote because, during the payroll eligibility period and election, he shared a community of interest with employees in the live haul department. The Employers, arguing against Clark's eligibility, maintain that he did not work in live haul.

The circumstances of Clark's association with the live haul department, which lasted from April through November, were litigated in detail. For about 13 years before November, when he was transferred completely away from live haul to work under Tommy Robinson, sanitation manager in the Respondent's main processing plant, Wilkesboro, Clark had driven a spray truck used to wash down Company streets. He also spray washed around the Wilkesboro live haul exterior areas,[285] the administrative offices,

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[285] The live haul facilities around which Clark's truck washed consisted of office and scales areas leading to receiving docks. Trucks that brought in caged chickens just caught at growers farms, would pass over the scales and be unloaded and uncaged by plant workers near the receiving docks. Droppings, feathers, offal, blood, grease and other by-products of the unloading and plant production processes provided much to clean in the vicinity.

the executive office and plant parking lots, three hatcheries, the outside grounds and parking lot at the feed mills in Roaring River[286] and the sheds at the three service centers.

For more than 12 of Clark's first years on the spray truck, until April 1989, he worked out of the Holly Farms shave and spray department in an area about 2 miles from the Wilkesboro complex, called "the bottom." About 30 employees reported to work there. Ray Huffman, manager of

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[286] Roaring River, as described in the Regional Director's Supplemental Decision, is about 15 miles from the Wilkesboro complex. The Respondents' 21 feed mill workers produced feed which was driven by the 27 feed haul drivers to the contract growers' farms. The feed haul drivers' trucks were serviced by mechanics at Service Center No. 3, also located at Roaring River. These Roaring River employees, including those at the service center, all were included in the live haul unit.

the shavings department, whom Clark regarded as his supervisor while based at that department, related that, in 1989, his department had been assigned 11 shavings trucks and 5 spray trucks.[287] The shavings trucks, operated by six drivers, were used to pick up leftover wood chips from lumber yards and to carry these wood shavings to the growers' farms to be used to line chicken house floors. Seven more drivers were permanently assigned to the tank spray trucks. These trucks used hoses and nozzles to produce a moist fog to wash and disinfect the chicken houses. The sprays from those trucks

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[287] Huffman, however, regularly operated only 6 of the 11 shavings trucks and 4 of the 5 spray trucks—keeping 1 spray truck as a spare.

differed from the powerful, ground-directed currents produced by Clark's vehicle, intended to wash blood, offal, grease and, sometimes even truck oil, from the ground. The sprays from Clark's truck, if so directed, would have been strong enough to kill, drown or bruise the chickens and damage the chicken houses. While at "the bottom," and afterward, only Clark drove his spray truck. He did not interchange with other drivers. Shave and spray employees did not participate in the election among the live haul, feed mill, feed haul and Service Center No. 3 employees and Local 391 does not now seek to represent them.

At the "bottom," Clark clocked in and out at shave and spray and parked

his truck there at the end of his shift. Although Clark technically reported to Huffman during that period, Huffman actually was not there when Clark was on the job as Huffman worked from 7 a.m. to 5:30 p.m., while Clark worked from 7 p.m. to 3:30 a.m. As Clark's work was largely repetitive, he generally knew what he was expected to do. Huffman, as needed, would leave Clark messages with the security guards. While working out of shave and spray, Clark's compensation was changed to that department's payroll and he wore the same blue uniform as other shave and spray employees. His truck was serviced by Service Center No. 2, then located at "the bottom."

In performing his work, Clark followed a schedule prepared for him by Everett (Skipper) Solomon, then Holly Farms' vice-president for North Carolina operations.[288] Under this schedule, Clark, at Wilkesboro, usually took 4 hours to spray-wash the roads, parking areas and all grounds around live haul. He also took additional time to spray-wash around the processing plant which, like live haul and other above areas, he washed every day.

Clark spray-washed around the Roaring River feed mill, the hatcheries and the service centers at different intervals. The feed mill and

[288] After the merger, Solomon became the regional manager for Tyson's North Carolina operations, essentially continuing in the same position.

the three service centers[289] were washed every other week, and the hatcheries were washed once each week.[290]

Clark related that, on two or three occasions during his approximately 12 years at shave and spray, he was assigned by Huffman to wash down the chicken houses, at which

[289] The service centers were located as follows: Service Center No. 1, at the Wilkesboro main processing plant, serviced trucks used for long haul and live haul transportation. Service Center No. 2, at the shave and spray facility, about 2 miles from the Wilkesboro complex, maintained shavings trucks and the spray trucks kept there. Service Center No. 3, at Roaring River, approximately 15 miles from Wilkesboro, serviced feed mill, hatcheries and some pullet trucks. Employees at Service Center No. 3 were included in the live haul unit with the other applicable Roaring River employees.

[290] The hatcheries attended by Clark were at Broadway, Fair Plains and Hayes, located, respectively, 4, 5-6 and 10 miles from the Wilkesboro complex. Hatchery employees were excluded as agricultural from the live haul unit, although their inclusion originally was sought by the Union.

time he also used a hose affixed to his truck. While at shave and spray, he similarly used the hose attachment to wash the chicken cages and the flatbed trucks used to transport them.

Clark testified that while he still was at shave and spray, the Company moved many of the spray trucks, excluding his own, from that department to live haul where they no longer were driven by shave and spray personnel, but by employees assigned to live haul.

Clark averred that in April, Huffman told him that the Company was going to have to move him from "the bottom" to live haul because the night shift at shave and spray, on which he had been working, was being

ended and as he was the only night shift employee there. Clark was informed that he would start at live haul the next evening and would continue to work the same hours there as at shave and spray.

Accordingly Clark reported to the live haul department at the Wilkesboro complex the following evening where the personnel department gave him a timecard to use in conjunction with the live haul timeclock in the recreation room within the live haul building. Clark continued to punch in and out at that timeclock until his November transfer to the plant.

Clark testified that, after his timecard was moved to live haul, his job remained the same as before except that at live haul he, for the

first time, was called upon to do extra spray work. This included spraying anywhere there was a gas or oil spill. This included such spills in live haul or in the main processing plant areas, immediately adjacent to live haul. He, also for the first time, was expected to flush out the water-draining manholes to keep them from stopping up.

Clark continued to spray wash the same areas as before being moved to live haul, allocating about the same time periods to each location. The principal difference involved in the change was that, at live haul, he began to park his own car in a fenced lot used by live haul employees and on-premises U.S. Department of Agriculture representatives. His truck

no longer was parked at "the bottom" but was garaged at the former forklift shop at the Wilkesboro complex. The door to the forklift shop was modified to accommodate Clark's truck.

As described above, the live haul department and Roaring River employees who voted in the election were parts of the Respondents' live production division. Employees in that division also worked at the hatcheries; prepared and transported feed to the contract growers on whose farms the chickens were raised; washed down and, in the summer, water-cooled the chicken houses; and caught, caged and transported the chickens to the processing plant receiving areas.

Within the unit, the live haul chicken catching crews consisted of chicken catchers and live haul drivers, all of whom used the live haul timeclock at the Wilkesboro complex. As noted, the live haul drivers then would transport the chicken catchers to the growers' farms where the catchers would spend the rest of their shift manually catching and caging chickens. The filled chicken cages would be loaded onto flatbed trucks and driven by live haul drivers over the Wilkesboro live haul scales[29] to the unloading docks where the chickens were unloaded, stored in sheds and uncaged by plan workers who shackled them, inverted,

[29] The known weights of the trucks were subtracted from the gross weight to determine the weight of the load.

onto a conveyor leading into the plant. The live haul drivers then would return to the farms to pick up additional loads of caged chickens. At the end of the shifts, which varied in length based on the amount of work, the live haul drivers transported the catchers back to the Wilkesboro live haul area, where they all clocked out.

Clark never worked as a chicken catcher or as a live haul driver and his only function at Roaring River was to spray wash the above-described areas.

Clark's street washer spray truck differed from the approximately eight other spray trucks kept at live haul or at shave and spray in that his truck was a tandem vehicle with body

bolted to the chassis, while all, but two, of the other trucks were tractor-trailer vehicles with detachable tank-type trailers. These other two vehicles also were tandem. While Clark's truck was equipped underneath with nozzles, the trucks used in live haul had hoses with pumps. The hoses were unrolled at the frame to gently spray-cool the chickens. Apart from those differences, the trucks essentially were the same with rear water tanks.

The live haul spray trucks, used only in summer to wet cool the chicken houses and chickens, differed from the year-round spray washing and disinfecting function of the shave and spray trucks. Unlike shave and spray, live haul spray trucks were

not operated by permanently assigned drivers, but by live haul drivers not immediately working with chicken catching crews.

On nights when the weather was too cold to operate the spray trucks, Clark helped plant sanitation manager Robinson, on cleanup.

Clark's testimony that, during his months at live haul, he reported to Chris Shumate, the live haul scales operator, who would tell live haul crews what to do and take crews out, is disputed by the Respondents. According to Clark, on an occasion when his truck had a flat tire while at the Hayes hatchery, he called live haul, and spoke to Shumate. Shumate had told him to stay where he was and

notified the service center which sent someone to fix Clark's truck.

Shumate,[292] who worked from 4 p.m. to 1 a.m., denied that Clark had reported to him or that he had given Clark work instructions, including directions to blow out the manholes —which was done twice a week.

In addition to his work on the scales, Shumate, for the preceding 2 years, before leaving at the end of his workweek, had removed the old timecards from the rack and put in new ones because he was the last to leave. He left the removed timecards on the desk of live haul secretary Betty Lankford. However, Shumate

[292] Chris Shumate, employed by the Respondents for about 14 years, had worked the live haul scales for the last 2 years. Before then he had been a live haul driver.

would leave Clark's timecards in the rack as Clark had told Shumate that he would take care of that himself.[293]

Jerry Blevins, second shift manager of the main processing plant, Wilkesboro,[294] and plant sanitation manager, Tommy Robinson, who reported to Blevins, both testified that Robinson had been responsible for

[293] Shumate drove Clark's truck only once, when he picked it up from the shavings department for maintenance. He had never operated it as a spray truck.

[294] Blevins, who has held his position for about 8 years, was responsible for approximately 900 employees who reported to him through intermediate supervisors. Blevins related that, in spite of the large number of employees who worked under his general supervision, he knew Clark well from a time 15 years before when Blevins had been his line supervisor. Blevins' hours were from 2 p.m. to 4 a.m.

Clark's work for about 8 to 10 years.[295]

On August 10, Blevins had had occasion to discipline Clark. Having received employee complaints that Clark was taking too long on breaks, Blevins discovered, after checking, that Clark had stayed in the switch room near the grease trap, for 1 hour and 40 minutes. Blevins, joined by other plant supervisors, including Robinson, spoke to Clark in the switch room. Blevins told Clark that he had been where he was for the above-described period; that it would be necessary for Blevins to set a time for Clark to take his break; that Clark, thereafter, would take

[295] Plant employees, specifically sanitation workers under Robinson, were not included in the live haul.

his break from 11:30 p.m. to midnight; that his words constituted a warning; and that if he caught Clark on break at any time other than the specified period, he would dismiss him. Blevins then filed with the personnel office a written disciplinary notice recording this incident.[296]

Robinson, who worked from 7:30 p.m. until 6 a.m., had been plant sanitation manager for about 20 years, with sanitation responsibilities for the external and internal plant areas, live haul, the streets and the receiving and hanging docks.

[296] Blevins testified that when he wrote the August 10 disciplinary notice, he was not aware that Clark's ballot had been challenged at the July 27 election.

Robinson testified that, included in his long-term supervision of Clark was responsibility for approving Clark's vacations, which he could do only if a replacement was available. In 1988 and 1989, he could not find replacements and, therefor, could not permit Clark to take off requested time.

Robinson also set Clark's work priorities. Since the U.S. Department of Agriculture inspected the receiving areas at 6 a.m. daily, Clark would have to wash that area each night between midnight and 12:30 a.m. Although Clark did not work for live haul manager Ray Lovette, as testified to by both Lovette and Robinson, Lovette has called Robinson to ask him to get Clark to throw

water in drains to unstop them and to keep Clark from putting water on the scales.

Clark was paid at an hourly rate about 28 cents below that afforded the 93 employees under Robinson.[297] He continued to wear the same blue uniform as he had at shave and spray. This uniform also was worn by live haul employees and by Robinson's plant sanitation workers. Other plant workers wore white uniforms.

Robinson testified that the live haul timeclock used by Clark between April and November was used only by live haul employees, except for Clark and two women on cleanup.

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[297] Except for Clark and eight other employees who cleaned the upstairs part of the plant, trash trucks, etc., the remaining sanitation employees reported to Robinson through four supervisors.

Clark testified that, during the relevant time, he took his breaks in the live haul break room with chicken catchers, live haul drivers and fork-lift operators. This room also was used by Shumate and by second shift live haul superintendent Bryce Wilburn. When at Roaring River, he took breaks with feed mill and feed haul personnel.

Robinson, on the other hand, testified credibly that there were no break-time places established for cleanup employees and that Clark took his breaks wherever he was at the time, whether in live haul, at the switch room near the grease trap or out on his truck. Robinson related that, every night, a number of his other employees would take their

breaks in the live haul break room to gain access to vending machines not available at the plant.

Blevins testified that, in April, regional vice-president Solomon who, inter alia, oversaw the Wilkesboro complex, told him that the Company was going to relocate Clark so that he would punch in near the plant since his truck was going to be left in the forklift shop. In that way, Clark no longer would have to go to "the bottom," punch in and then come to the complex to work. Solomon also stated that Ray Huffman no longer would be telling Clark what to do and that Clark would be strictly under Tommy Robinson.

The record contains testimony that Clark had received a Company ring as

a safety award from live haul manager Ray Lovette, thereby tying Clark closer to the live haul operation. The clearest statement concerning this award came from Ray Huffman who testified that under Company policy, after 5 years of accident-free driving each driver was awarded a ring set with a ruby. For each year of safe driving thereafter, a diamond was set around the side of the ring.

Clark became entitled to a diamond addition to his ring for safe driving during the period from May 1, 1988, to April 30, 1989, and, accordingly, the award matured while Clark was still working out of shave and spray. The rings were distributed by a safety official at a supper held at the Elks' Club a week after Thanksgiving

1989. Huffman, on vacation at the time, did not attend the supper.[298]

The record contains conflicting testimony as to whether Clark had attended certain meetings of live haul employees between April and November, with Clark contending that he had, and others denying this. From the detailed evidence concerning Clark, I do not consider it necessary to resolve Clark's presence at these meetings to determine his status. As

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[298] Clark testified that while Huffman had sent the ring out to be fitted with another stone, the finished ring was given to him in April or May by live haul manager Ray Lovette at the end of a private meeting. However, Lovette denied having made the presentation or in having had anything to do with Clark's award. I credit Huffman's account because it is the most clearly-recalled, authoritative version. In addition, if the award had been given in April or May by Lovette, as described by Clark, it still necessarily would have been earned for work performed while Clark had been in shave and spray, and Lovette's role in passing it along, at most, would have been incidental.

explained by Lankford, Company payroll records coded Clark's street washer's classification during the relevant April-November interval to show that his pay was being charged to the overall Wilkesboro complex rather than to shave and spray, live haul or the plant.

In November, Clark's spray truck broke down and repairs were judged to be too expensive. Accordingly, as of November 30, Clark was transferred to plant sanitation under Robinson's general supervision; his driving was discontinued; his pay was increased by 28 cents/hour to the level of Robinson's other sanitation employees; and the Union does not contend that, after this transfer, Clark continued to be within the live haul unit.

I credit the Employers' evidence that Clark reported to both Huffman and Robinson before April, while still with shave and spray and that from April to November, after his timecard had been relocated to live haul, he continued to report principally to plant sanitation manager Robinson, subject to additional direction by Blevins. I find no convincing evidence that Clark ever was responsible to scales operator Shumate or to Ray Lovette, live haul manager.

These conclusions are supported by the facts indicating that Robinson and Blevins, alone of Clark's other attributed supervisors, worked hours that coincided with Clark's so as to allow effective knowledge of what

Clark was doing and what he still needed to do; that Clark's sanitation duties came squarely within Robinson's area of responsibility; that when the weather did not permit operation of the spray truck, Clark did plant sanitation work for Robinson; that, on August 10, it was Blevins, Robinson and other plant officials who participated in disciplining him. Although Clark's work was repetitive, closer supervision by Company officials who worked the same hours had importance because of the daily 6 a.m. U.S. Department of Agriculture inspection. I also find that Shumate's work had no inherent supervisory component requiring that he issue instructions involving the exercise of independent judgment. He

might inform a live haul driver when he was ready for that truck to drive across his scales and, possibly, could have pointed out some spills on the streets that Clark might want to spray-wash, but such actions would be routine in nature. Ray Lovette, whose regular work hours were in the daytime, also was not situated to have regularly and systematically supervised Clark. Accordingly, I find that from April-November, Clark was supervised and, as required, disciplined by plant officials Robinson and Blevins, and not by live haul personnel.

(b) The challenged ballot of Tony L. Clark— discussion and conclusions

As more recently restated in Keeler Brass Automotive Group, A Division of Keeler Brass Company:[299]

> . . . . whether individual employees are included in the bargaining unit as set forth in the election agreement depends on whether they share a sufficient 'community of interest' with other unit employees. In Kalamazoo Paper Box Corp., 136 NLRB 134 (1962), the Board enumerated the factors to be considered in determining whether individuals have a community of interest apart from other employees such that they would not belong in the same unit:
>
> > [A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working tie spent away from the employment or plant situs . . .; the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and the history of bargaining.

Applying the above criteria, I find that during the April-November period when Clark used the live haul timeclock and parked his car in that parking lot, he did not acquire a community of interest with the live haul or Roaring River unit employees sufficient to warrant his inclusion in that unit. Although Clark, during those months, continued to spray-wash around unit locations, including the live haul area, the scales, parking

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[299] 301 NLRB No. 114 (JD 18).

lots and the relevant Roaring River facilities, his duties also comprehended, as before, spray-washing premises unrelated to the unit. These included areas around the Company's administrative offices, three hatcheries, the main processing plant and Company streets quite removed from the live haul facilities.

The record indicates that Clark's relocation to live haul was an administrative measure to move him, as a functionally distinct employee, nearer to where he performed much of his work—the Wilkesboro complex, itself, rather than just to the live haul department. This was because, although he had performed essentially the same work for about 12 prior years while based at "the bottom,"

2 miles from the complex, there is no showing that he had been expected to spray-wash there. Accordingly, Clark had been taking round trip detours of at least 4 miles a day simply to use the timeclock and parking facilities of a place where he served no functional purpose.

Clark's relocation to the live haul facilities and vicinity did not functionally integrate him into the live haul work. His duties were completely unlike those of the chicken catching crews, including those of the 36 live haul drivers. While certain live haul drivers, during the warmest months, when not out with the chicken catching crews, would be assigned to drive tank trucks to the farms to spray-cool the chicken

houses and chickens, Clark claimed to have performed this cooling function only once in his 13 years of spray truck driving. At that time, it had been necessary to refit his truck with a hose and fine-spray nozzle, equipment he otherwise did not use.[300] Clark drove his street spray truck throughout the year while, as noted, the live haul drivers spray-cooled only incidentally to their regular work with chicken catching crews and, then, only in the summer. Clark, who never worked as a chicken catcher, did not interchange with the live haul drivers and was the only employee to drive his spray truck.

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[300] Clark claims that on two occasions while at shave and spray, he also used his truck, refitted, to wash chicken houses.

In fact, the record shows that except for those occasions when, as circumstances permitted, Clark was situated to use the live haul break room or the Roaring River break room for his rest periods, he had little contact with live haul unit employees. The solitary nature of his work separated him from other employees and, except for spray washing the exteriors, his functions were unrelated to the basic feed mill, feed haul work done by Roaring River employees. This situation is not materially changed by the fact that Clark might occasionally fuel his truck at Roaring River Service Center.

Clark's separation from live haul unit work and those who performed it was further exemplified by his as-

signment to do plant sanitation work under Robinson on nights when it was too cold to use his truck, rather than live haul/feed haul driving or some other assignment within the bargaining unit. This course was continued in November when he was permanently assigned to the plant after his truck's final breakdown, instead of to to a unit position.

While Clark was using the live haul timeclock and parking his car in its lot[301] his earnings were not charged to live haul, but to the

[301] The record shows that, in the late hours when Clark was parked in the lot while at work, the live haul lot was opened to others besides live haul workers and Department of Agricultural representatives.

Wilkesboro complex payroll, which premises he generally serviced.[302]

From the entire record, I find that Clark, while using the live haul timeclock, remained as functionally separate and distinct from the work and personnel of the live haul/Roaring River unit as when he had been operating the same spray truck, for essentially the same purposes, when based in shave and spray; that he had not shared a sufficient community of interest with members of the live haul/Roaring River unit to warrant

[302] The Union's argument that Clark "interacted" with feed mill and feed haul employees by cleaning around their areas and because his "K" pay code designation was shared with feed service employees is thin. Clark spent more time cleaning around other non-unit areas and his "K" code designation was broad enough to also include broiler farms employees, equipment installers, sanitation-supply employees and supervisors, shavings employees and guards.

his inclusion; and that the challenge to his ballot should be sustained and his ballot not be opened and counted.[303]

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[303] C. M. Carpenter, et al, d/b/a Carpenter Trucking, 266 NLRB 907, cited by the Union, is distinguishable. In Carpenter Trucking, supra, tank truck drivers were placed in the same unit with dump truck drivers because drivers of both types of trucks exercised like skills and because of similarities between certain of the two types of vehicles. In Carpenter Trucks, unlike here, there was considerable interchange between the two types of drivers. All tank truck drivers in Carpenter Trucks started with that Employer as dump truck drivers, and tank truck drivers occasionally drove dump trucks when the tanker business was slow. Before transferring from dump truck driving to tank truck driving, dump truck drivers received training by riding with tank truck drivers. Moreover, although there were differences in their respective work hours and in certain work conditions, as that decision reflects, each type of driver was work-dependent upon performance by the other. In the present matter, Clark was not functionally tied to or integrated in the work of the unit. Clark's use of his truck as the Company's only street washer was unique. He did interchange with other drivers or their vehicles, and unlike live haul and feed mill drivers, he did not work with other vehicle operators to achieve a similar purpose. There also is no evidence that Clark had operated a live haul or feed haul truck on his way to becoming a street wash spray truck operator.

2. The Objections to the Election in Case 11-RC-5583

With one exception, the Union's objections to the election closely parallel certain of the unfair labor practice allegations of the amended consolidated complaints where violations have been found; including, in effect, that the Respondents had ordered employees to cease from, and had threatened to have off-duty employees arrested for, union handbilling during non-worktime and in non-work areas; had coercively interrogated employees concerning their union activities and sympathies; had promised employee benefits and had threatened retaliation to discourage employee support for the Union. These unfair labor practices, found above, precluded the exercise of a

free and uncoerced choice in the election.

Only Objection No. 7 did not track complaint allegations and was separately litigated. Objection No. 7 alleges that:

> The Employer or its authorized representative was in the polling area campaigning during the time the polls were open.

In support of this objection, the Union contends that because, during hours when the July 27 polls were open in Wilkesboro and the election was being conducted, the Respondents' live haul office manager, Commie Johnson, spent extensive time in the break room which led directly to the immediate storage room voting place; that he electioneered while there; and that he entered the storage room

voting area on two occasions while that station was open to receive voters.[304]

The Respondents contend that it was not unusual for Johnson to be in the break room since it was necessary for him to pass through there to go to and from his office. Accordingly, he would be in the break room 20-25 times during a typical day.[305] The Respondents further point out that both of Johnson's visits to the immediate voting area were very brief,

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[304] Voting places were established at Wilkesboro and Roaring River for the July 27 election. The Wilkesboro voting was conducted at the storage room, Live Haul Office Building, from 7 a.m. to 10:30 a.m., and from 12 noon to 2:30 p.m. Only the Wilkesboro voting facility was involved in this election objection.

[305] Johnson would go through the break room from his office to get to the live haul scale, to check on the live chickens in the sheds and to get to the cage repair shop and back.

had been to enable him to supply certain items jointly requested by election observers and had occurred when no voters were in the voting place.[306]

As noted, the actual voting was conducted in a 13 by 26.5 foot storage room in the live haul office building located off one corner of the break room. The break room, at its shortest length, measured approx-

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[306] The Respondents, consistent with their position that live haul personnel are exempt agricultural workers, deny that Johnson, with responsibilities in live haul, was a supervisor within the meaning of the Act. However, the Respondents agree that Johnson otherwise met the criteria as to authority and function that would establish him as their supervisor and agent within the meaning of Section 2(11) and (13), respectively, of the Act if the personnel and work he supervised, in their view, had not been exempt. Since, as noted, the Board has found that live haul employees were not exempt but, properly, were included in the unit, I find that Johnson, who has held his position since 1986, at all material times, was the Respondent's supervisor and agent within the meaning of the Act.

imately 32 by more than 40 feet. Board election notices were posted outside each of the two break room entrances and, generally, voters used either of these two doorways to pass through the break room in order to reach the immediate voting place. Vending machines were situated along one side of the break room and the timeclock and card rack were along another wall. Three pool tables were spaced parallel to each other in the center of the room. A third entryway to the break room, not used by voters, opened to the clerical office area, adjacent to one side of the voting area/storeroom. The clerical office area, in turn, led to the of-

fice space used by live haul manager Ray Lovette and Johnson.[307]

Employees who, during the election, entered the break room used by most voters, proceeded the 32 feet across the width of the room, turned left and proceeded about another 10 feet to the voting place/storeroom entrance. Employees who used the other entryway would continue for more than 40 feet, then bear right and continue about 10 feet more up a corridor to the voting place entrance. Since, as noted, the door to the voting place was recessed up a

[307] Although Lovette and Johnson, as the Respondents indicate, would have had to pass through the clerical office area and break room while going to and from their own offices, they need not necessarily have done so while voting was in progress. Johnson conceded that he had not followed Ray Lovette's example in temporarily moving to a different office away from the the voting place during the election hours.

short corridor at an angle from the break room, apparently it would have been quite difficult to see into the immediate polling area from the break room.[308] As noted, however, the Board's election notices were posted outside the two doors to the break room used by voters coming to the polls, and the break room provided the only relevant access to the storeroom voting area.

Johnson testified that, during the July 27 voting hours, he was inside the break room 12 to 15 times, aggregating about 2 1/2 hours there. While there during the voting, he saw

[308] While employee Jerry A. Spicer, a union observer at the election, testified that it was possible to see into the storeroom/voting place from the break room, such testimony appears inconsistent with a detailed drawing of the area in evidence.

about 12 employees who apparently did not leave, but who simply remained, apparently loitering, and that he had seen an average of 8-10 employees at a time, lingering, using the vending machines and standing around the pool tables. Johnson engaged in small talk with nine or ten of the employees, discussing topics unrelated to the Union or to the voting, except that he did suggest to employee John Gilreath that Gilreath vote before starting work at 2 p.m. This was because the polls would be closed if Gilreath had waited until he returned to the facility.[109] Johnson denied

[109] I do not find Johnson's neutral statement to Gilreath suggesting that he vote before leaving, to constitute electioneering or, otherwise, to be of significance.

having seen anyone in the break room actually waiting to vote.

Johnson, recalling that James Isaac and Tony Bell were Company observers at the election and that Jerry Spicer and James Phillip Church were Union observers, testified as to how he had come to visit the storage room voting area twice during voting hours. He related that he first went to that voting place shortly before 8 a.m. in response to a request by Church and Isaac for ashtrays. Johnson brought some ashtrays from his office to the voting place and left. It is undisputed that he was in the voting place on that occasion for less than a minute.

The second visit was in response to a request, at around 8:30 a.m.,

for a fan, also by Church and Isaac. Johnson related that, when a fan could not be found in the building, an employee volunteered to bring one from home. After the employee produced the fan, Johnson took it into the voting place, plugged it into a socket, told the Board agent and observers that there was their fan and left. Again, Johnson was there not longer than a minute. Johnson testified without contradiction that no voters were in the polling room during either of his visits. Although the Board agent did not protest his presence, Johnson conceded that he had not identified himself.[310]

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[310] Union observer Spicer generally agreed with Johnson's testimony, but claimed that Johnson had identified himself to the Board agent as Ray Lovette's assistant when (continued...)

Johnson also explained the circumstances under which he had given out three baseball-type caps with the Tyson logo to employees in the break room while the election was in progress. When Tyson board chairman Don Tyson had visited the Wilkesboro facility in mid-July, soon after the takeover, certain employees who had seen him wear such a cap requested caps for themselves. Tyson promised to send them. A few days later, when the caps arrived, Johnson and other supervisors were instructed to distribute them and to tell the recipient employees that Don Tyson had sent them.

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[310](...continued) providing ashtrays during his first trip to the voting place, and that he had remained there on that occasion slightly longer than was described by Johnson.

Accordingly, 2 or 3 days before the election, the supervisors had given the Tyson baseball caps to each of their crew members. However, they left 15 to 18 caps, intended for certain employees they could not reach, in Johnson's office, requesting that he store and distribute them. Johnson thereafter gave about 15 of these caps to employees—handing out about 5 caps before July 27; approximately another 5 on the July 27 election date; and the same number after the election. Johnson testified, however, that on the day of the election, he only gave caps to employees who had requested them. In this fashion, Johnson gave three caps to employees in the break room while the polls were open. When the employees had

asked him for these caps, Johnson obtained them from his office and took them to the break room, telling the employees only that Don Tyson had sent them the caps.[311]

In accordance with Marathon Metallic Building Company,[312] Johnson's two brief visits to the storeroom voting area do not warrant setting aside the election. Whether or not Johnson identified himself as a supervisor to the Board agent, Johnson, on each occasion, had remained in the voting area for no more than a minute before leaving of his own accord. Both of his visits had been in response to joint requests by Company

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[311] At the end of the voting, the Company observers, as directed, did not sign the certificate approving conduct of the election.

[312] 224 NLRB 121, 125.

and Union observers for ashtrays and a fan for their use and the evidence indicates that no voters were present in the voting place while he was there. I do not find voter intimidation from these two incidents.

The remaining question in this area is whether Johnson's admitted conduct in passing out three Tyson baseball caps in the break room during voting hours to employees who had requested them constituted electioneering that would warrant setting aside the election. As restated by Administrative Law Judge Herzog in his Board-approved decision in Antenna Department West:[313]

> In Milchem, Inc., 170 NLRB 362 (1968), the Board concluded that, in order to prevent electioneering by parties to the election among employees preparing to vote, and to protect employees from distraction, pressure, and unfair advantage from prolonged conversations during the important final minutes before employees cast their ballots, a 'strict rule' against such conduct, without inquiry into the nature of the conversations, was warranted. The only exceptions announced to this rule were that trifling, chance, isolated, and innocuous comment or inquiry by an employer or union official would not necessarily void an election.

[313] 266 NLRB 909, 914.

Milchem, then, was intended to prevent electioneering by parties to the election among employees preparing to vote so as to protect them from the above undesirable consequences of such electioneering in the critical period just before the employees voted.

Here, there is no evidence showing either that employees who accepted the Tyson caps from Johnson had not asked for them,[314] or that any of the employees who received the caps, or who had witnessed their distribution, if any, had then been waiting to vote. Johnson was the only witness to testify concerning the distribution of these Tyson caps and, in the absence of evidence to the contrary, his account must be credited. From the foregoing, I conclude that Johnson's distribution of the Tyson baseball caps to three employees in the break room during the election does not warrant setting aside the election. Also, without condoning the extended time Johnson spent in the break room during voting hours, such conduct, by itself, similarly does not provide grounds for setting aside the election.

In view of the bargaining order found applicable herein, it is recommended that the election in Case 11-RC-5583 be set aside and that that representation proceeding be dismissed.

[314] Distribution by an employee of anti-union material is not unlawful absent some form of coercion or pressure on employees to receive the material. McDonalds', 214 NLRB 879, 881-883.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondents set forth in section III, above, occurring in connection with the Respondents' operations described in section I, above, have a close, intimate and substantial relationship to trade, traffic and commerce among the

several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

Conclusions of Law

1. The Respondents, Tyson Foods, Inc./Holly Farms Corporation, each are engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent, Tyson Foods, Inc., at all material times herein since July 18, 1989, has been the successor to and proprietor of Respondent Holly Farms Corporation, succeeding to Holly Farms' bargaining obligation with the labor organizations named below, and shares with Holly Farms joint and several lia-

bility to remedy Holly Farms' unfair labor practices found herein.

3. Chauffeurs, Teamsters and Helpers Local Unions No. 29, 71, 355, 391, 592, 567 and 988, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, herein the Unions, are labor organizations within the meaning of Section 2(5) of the Act.

4. The Respondents violated Section 8(a)(1) of the Act by:

(a) Repeatedly threatening their long distance drivers that the transportation department in which they were employed would be closed if they chose the Unions as their bargaining agent.

(b) Repeatedly threatening their long distance drivers that if the Unions won, or even lost, the forthcoming representation election, the Respondents would take away the employees' jobs by selling all their trucks and by contracting out their hauling work.

(c) Repeatedly soliciting grievances from their employees and promising directly, or by implication, to adjust them in order to induce their employees to abandon the Unions.

(d) Telling their employees that it would be futile for them to support the Union.

(e) Repeatedly threatening their employees with unspecified reprisals for having supported the Unions.

(f) Telling their employees to abandon the Unions in favor of forming a committee to negotiate with management concerning terms and conditions of employment.

(g) Promulgating, maintaining and enforcing a rule which prohibits employees from distributing materials in non-work areas on the Respondents' property during non-work hours.

(h) Respectively, threatening and causing the arrests of their employees for distributing union materials in non-work areas on the Respondents' property during non-work hours.

(i) Informing their employees that other employees had been arrested for distributing union materials

in non-work areas of the Respondents' premises during non-work hours.

(j) Threatening their employees with discharge should they distribute union materials in non-work area of the Respondents' premises during non-work hours.

(k) Repeatedly disciplining their employees by issuing written warnings to them because of their union activities.

(l) Promulgating, maintaining and enforcing a rule which prohibited their employees from discussing wages with other employees.

(m) Threatening to retaliate against their employees by assigning them less mileage, thereby reducing earnings, because they chose the

Unions as their bargaining representative.

(n) Repeatedly coercively interrogating their employees concerning their union activities, sympathies and desires.

(o) Prohibiting employees from wearing union hats or insignia and by threatening retaliation for such conduct.

(p) Discriminatorily prohibiting the posting of union materials on the Respondents' bulletin boards.

(q) Threatening their employees with discharge if they should chose the Unions as their bargaining agent.

(r) Threatening their employees that other employees who were prominently active for Local 391 would be discharged should the employees not

choose the Union as their bargaining agent.

(s) Threatening their employees that the Respondents' management would know how they voted in the scheduled representation election should they choose Local 391 to be their bargaining agent.

5. The Respondents, in order to discourage union membership and activities, violated Section 8(a)(3) and (1) of the Act by:

(a) Discriminatorily discharging their employees Alvin Bouchelle, Patricia Barker, Raymond K. Huffman, Jr., and Joseph Richardson.

(b) Constructively discharging their 47 employees named below:

Earl Howell
Fred Royal
Gene Harris
Danny Osborne

Bill Ray Johnston
Dan Wingler
Ray Kanupp
George Glass
Bryant Welborn
James Spicer
Mike Hamby
Mike Maudlin
Thomas Alexander
Larry Eldreth
Donnie McClary
David Anderson
Butch Miller
Gene Hester
James Sparks
George Barber
Teddy Ray Hayes
Steve Eller
Curtis Eastridge
Donald Dollar
Jerry Fisher
R. J. Absher
Clark McNeil
Earl Eller
Jerry Blackburn
Kenneth Eller
Sam Badgett
Robert Crook
Harden Branscome
Bill St. John
Mike Dancy
Thomas Roope
David Laney
Zane Filipic
Denny Patrick
Romey Nelson
David or Danny Howell
Jerry Mealy
Patrick Owens
Donnie Blackburn

Jerry Miller
Michael Simmons
Mike Staley

(c) Discriminatorily disciplining their employees James Phillip Church, Gene Hester, Teddy Ray Hayes and Harden Branscome by the issuance of written warnings.

(d) Discriminatorily granting their live haul unit employees a pay raise shortly before a scheduled representation election.

6. The following employees of the Respondents constitute an appropriate unit for bargaining under Section 9(a) of the Act:

> All driver employees and yardmen employed by Tyson Foods, Inc./Holly Farms Corporation who regularly are dispatched for outhauls through those Companies' terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at those Com-

> panies' facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg and Temperanceville, Virginia; and Sequin and Center, Texas, excluding all office clerical employees, guards and supervisors as defined in the Act.

7. At all times since March 24, 1989, the seven above-named Teamsters local unions, herein the Unions, have been, and are, the exclusive jointly-certified representative of the employees in the above-described unit for purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

8. The Respondents violated Section 8(a)(5) and (1) of the Act on and after August 8, 1989, by:

(a) Announcing to the Unions that they were going to unilaterally

integrate their employees within the former Holly Farms transportation department western division, into the Tyson transportation system.

(b) Announcing to the Unions that the former Holly Farms eastern transportation division would be unilaterally reduced by the layoff of 71 drivers and the removal of 47 tractors.

9. The Respondents violated Section 8(a)(5) and (1) of the Act on and after September 12, 1989, by:

(a) Announcing to the Unions, respectively, that they unilaterally were going to completely integrate the former Holly Farms transportation department, eastern and western divisions, into the Tyson transportation system; that the Respondents uni-

laterally were going to change the wages, work locations, hours of employment and other terms and conditions of employment of the bargaining unit employees, while offering to bargain only about the effects of such decisions.

(b) Bypassing the Unions and negotiating directly with unit employees concerning their wages, hours and other terms and conditions of employment.

(c) Withdrawing recognition from the Unions as the exclusive collective-bargaining representatives of the employees in the above-described unit, and, thereafter, by failing and refusing to recognize the Unions as the exclusive collective-bargaining

representative of the employees in the said unit.

(d) Failing and refusing to provide the Unions with a copy of the requested merger agreement between Tyson Foods, Inc., and Holly Farms Corporation.

10. The Respondents violated Section 8(a)(5) and (1) of the Act on and after September 22, 1989, by:

(a) Effectuating the previously-announced integration of the former Holly Farms transportation department, eastern and western divisions, into the Tyson transportation system.

(b) Unilaterally changing the wages, hours, work locations and other terms and conditions of employment of employees in the above-described unit.

(c) Constructively discharging the 47 above-named unit employees for refusing to continue their employment with the Respondents under the unilaterally-imposed wages, hours and other conditions of employment.

(d) Unilaterally changing the absentee call-in policy as to when employees, to avoid discharge, must report their absences to the Respondents.

(e) Announcing to employees that, at a specified later date, the existing Holly Farms pension plan covering bargaining unit employees would be unilaterally discontinued and the proceeds paid out.

11. The strike that began on October 1, 1989, is a protected unfair labor practice strike caused by the

Respondents' above-described unfair labor practices.

12. The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All live haul employees (chicken catching crews) employed at the processing facility of the Respondents located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at the facility of the Respondents located at Roaring River, North Carolina, excluding all office clerical employees, guards and supervisors as defined in the Act.

13. On or about March 31, 1989, Local Union No. 391, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, herein the Union, separately repre-

sented a majority of the employees in the unit described immediately above and, since that date, has been the exclusive representative of all such employees for purposes of collective bargaining.

14. The Respondents have violated Section 8(a)(5) and (1) of the Act by failing and refusing, since April 3, 1989, to recognize and bargain with the above-named Union as the exclusive bargaining representative of the employees in the immediately above-described unit.

15. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

16. The Respondents' unlawful conduct interfered with the representa-

tion election held on July 27, 1989, in Case 11-RC-5583.

The Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I shall recommend that they be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. For the reasons set forth above, I shall recommend that the Respondents be ordered, upon request, to bargain collectively with the seven above-named Teamsters local unions as the jointly-certified exclusive bargaining representative of the employees in the above-described drivers-yardmen unit, and with Local 391 as the exclusive collective-bargaining repre-

sentative of the employees in the above-described unit which includes live haul employees.

Since the Respondents, under current Tyson management, have not honored the certification of representative which the Board issued to the seven above-named Teamsters local unions on March 24, 1989, I will recommend that the certification year be extended to run for a period of 1 year commencing from the date the Respondents begin to bargain in good faith and that the Respondents be required to bargain with the Unions during that period as if the year following certification had not expired.[315]

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[315] Mar-Jac Poultry Company, 136 NLRB 785; Hydrotherm, Inc., 302 NLRB No. 153 (JD 21).

Having found that the Respondents breached their bargaining obligations under the Act with respect to the drivers-yardmen unit by withdrawing recognition from the Unions as the certified bargaining representative of the employees in that unit and by instituting unilateral changes affecting wages, hours, work locations and other terms an conditions of employment, and to restore as nearly as possible the status quo ante, I shall recommend that the Respondents, upon request, be required as to its employees within the drivers-yardmen unit, as amended above, to recognize and bargain with the Unions and to reinstate the work scheduling, rates of pay, road fees and benefits plans and the work rules that had been in

effect for such employees on September 12, 1989, before the Respondents' unlawful unilateral changes. The Respondents also should be required to make whole its employee-members of the drivers-yardmen unit for any losses they may have sustained since September 22, 1989, by having been unlawfully required to work since that date under the Respondents' unilaterally-imposed unlawful changes by paying to those employees sums equal to what they would have earned from mileage driven and/or from other forms of compensation under the pay and benefits plans and road fee schedules, as available to them on September 12, and their earnings under the Tyson Pay and Benefits plans and road fee schedules since Septem-

ber 22, 1989.[316] Any such earnings differentials should be computed to the extent appropriate as prescribed in Ogle Protection Service, Inc.[317]

Having found that Respondents unlawfully discharged Patricia Barker, Raymond K. Huffman, Jr., Alvin Bouchelle and Joseph Richardson, and

[316] Contrary to the Respondents, I find that the unit drivers' backpay entitlements were not reduced because Tyson assertedly had offset its unilateral reductions in mileage rates and other forms of compensation by requiring that its employees accumulate more lower paid mileage each pay period than had Holly Farms, which policy resulted in greater gross earnings. The unnegotiated extra mileage required by Tyson, in itself unlawful, should not obscure the unilateral changes which deprived the drivers of previously-available higher mileage rates and of other fees favorably affecting their earnings while requiring less work.

[317] 183 NLRB 682. As the record indicates that changes in pay rates, road fees, work locations, work scheduling and other terms and conditions of employment occurred on different dates for eastern and western division unit employees, it will be left to the compliance stage of this proceeding to determine precisely when such changes, respectively, occurred in determining applicable retroactivity dates.

that, on September 22, 1989, they constructively discharged the 47 above-named employees, and have refused to reinstate all of the foregoing, the Respondents should be required to offer all of the aforesaid individuals, whether directly or constructively discharged, immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and to make each of them whole for any loss of earnings suffered as a result of the Respondents' unlawful conduct by payment of sums equal to those which they would have earned absent the unlawful conduct against them, with backpay and

interest computed in accordance with the formula set forth in F. W. Woolworth Company,[318] with interest as computed in New Horizons for the Retarded.[319]

While the Respondents, upon request, should be required to rescind unilateral changes affecting the drivers-yardmen unit since September 22, 1989, this should not be construed as requiring the Respondents to cancel any wage increases or other

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[318] 190 NLRB 289.

[319] 283 NLRB 1173. In accordance with the decision in New Horizons for the Retarded, supra, interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Section 6621. The foregoing reinstatement and make-whole remedies also should be applied to any employees who were discharged or otherwise disciplined by virtue of the unilaterally-changed absentee call-in policy found unlawful above, or pursuant to other unlawfully changed work rules.

improvement in wages without request from the Unions.

Having also found that the Respondents unlawfully issued written warnings to employees Harden Branscome, Teddy Ray Hayes, Gene Hester and James Phillip Church, they should be required to rescind those warnings. References to all disciplinary proceedings found unlawful herein, whether to the aforesaid warning notices, to the above-noted discharges and constructive discharges, or to any employees disciplined under unlawfully changed policies and work rules, should be removed from the personnel files of the affected employees, and such disciplinary actions should not be considered in any future personnel actions against

these employees. The affected employees should be notified in writing that such expunction has been completed.

Having found that the Respondents have failed and refused to furnish the Unions with a copy of the merger agreement between Tyson Foods, Inc., and Holly Farms Corporation, as requested, and that such document is necessary to the performance of the Unions' bargaining responsibilities, the Respondents, upon request, should be required to provide the Unions with a complete copy of that document.

Having found that the Respondents unlawfully announced that the pension plan in effect for employees as of September 22, 1989, will be termi-

nated and paid out at a specified later date, the Respondents should be required, upon request, to rescind that announcement and bargain with the above-named Unions concerning retirement plans. If applicable, the Respondents should be required to reinstate the original pension plan retroactively to the date on which it was discontinued and make whole any employees adversely affected by that unlawful unilateral change.

Having found that the Respondents unlawfully changed their absentee call-in policy by requiring that, to avoid discharge or other discipline, employees must call in to report their absences to the Respondents within 2 days instead of 3 days, as before, the Respondents, upon re-

quest, should be required to rescind this unilaterally changed policy and bargain with the above-named Unions concerning absentee call-in requirements.

As a bargaining order has been found appropriate with respect to the unit which includes live haul employees, it is recommended that the election held in Case 11-RC-5583 be set aside and that the petition in that matter be dismissed.

Since the strike herein has been found to be an unfair labor practice strike, upon their unconditional application to return, the Respondents shall be required to offer immediate reinstatement to all striking employees to their former positions or, if those positions no longer exist, to

substantially equivalent positions, without loss of seniority and other rights and privileges, dismissing, if necessary, any persons hired as replacements on or after October 1, 1989. Backpay for such striking employees shall commence 5 days after they respectively make unconditional application to return to work and continue to accrue until the date when the Respondents offer reinstatement, in the absence of lawful justification for the Respondents' failure to make such an offer.[320] In the event that backpay for striking employees becomes applicable because of the Respondents' unjustified refusal to offer reinstatement to those who

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[320] Drug Package Company, Inc., 228 NLRB 108.

should make unconditional application for same, such backpay shall be calculated in the manner previously set forth for discharges in this Remedy section.

As the unfair labor practices found herein are serious, pervasive, numerous and calculated, affecting employees in more than two bargaining units, and are attributable to the highest levels of the Respondents' management, it is clear that the Respondents have evidenced a readiness to violate the Act to such degree as to warrant recommending that the Respondents be restrained by a broad cease and desist Order.[321]

Upon the foregoing findings of fact, conclusions of law, and the

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[321] Hickmott Foods, Inc., 242 NLRB 1357.

entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[322]

ORDER

The Respondents, Tyson Foods, Inc. /Holly Farms Corporation, jointly and severally, their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Threatening their employees that the departments in which they are employed will be closed if they should choose Chauffeurs, Teamsters and Helpers Local Unions Nos. 29, 71, 355, 391, 567, 592 and 988, affili-

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[322] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, herein the Unions, or any other labor organization, as their bargaining agent.

(b) Threatening their employees that, whether or not they choose the above-named Unions as their bargaining agent, the Respondents will take away their jobs by selling the trucks they drive and by contracting their hauling work to outside concerns.

(c) Soliciting grievances from their employees and promising, directly or by implication, to adjust them in order to induce their employees to abandon the Union.

(d) Informing their employees that it would be futile for them to

join or support the above-named Unions, or any other labor organization.

(e) Threatening their employees with unspecified reprisals for having supported the above-named Unions.

(f) Advising their employees to abandon the above-named Unions in favor of forming a committee to negotiate with the Respondents with respect to wages, hours and other terms and conditions of employment.

(g) Establishing, maintaining and enforcing a rule which prohibits their employees from distributing union materials in non-work areas of the Respondents' premises during non-work hours.

(h) Respectively, threatening their employees with arrest and caus-

ing their employees to be arrested or distributing union materials in non-work areas of the Respondents' premises during non-work hours.

(i) Informing their employees that other employees had been arrested for distributing union materials in non-work areas of the Respondents' premises during non-work hours.

(j) Threatening their employees with discharge should they distribute union materials in non-work areas of the Respondents' premises during non-work hours.

(k) Establishing, maintaining and enforcing a rule which prohibits their employees from discussing their pay rates with each other.

(l) Threatening to retaliate against the employees by assigning

them less mileage, and thereby lessening earnings, because they chose the Unions as their bargaining representative.

(m) Coercively interrogating their employees concerning their union activities, sympathies and desires.

(n) Prohibiting their employees from wearing union hats or insignia.

(o) Threatening their employees with retaliation for wearing union hats or insignia.

(p) Discriminatorily prohibiting their employees from posting union materials on Respondents' bulletin boards.

(q) Threatening their employees with discharge should they choose the

above-named Unions as their collective-bargaining agent.

(r) Threatening their employees that other employees who were active for Local 391, above, would be discharged should the employees not choose that Union as their bargaining agent.

(s) Threatening their employees that the Respondents' management would know how they voted in a scheduled representation election should they choose a Union as their bargaining agent.

(t) Discouraging membership in a labor organization by discharging and /or constructively discharging employees; and by issuing written warnings to their employees for engaging in union activities; and by discrimi-

natorily granting their employees special pay raises.

(u) Refusing to recognize and, upon request, to bargain with the above-named Unions as the exclusive collective-bargaining representative of their employees in the following appropriate unit:

> All driver employees and yardmen employed by Tyson Foods, Inc./Holly Farms Corporation who regularly are dispatched for outhauls through those Companies' terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at those Companies' facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg and Temperanceville, Virginia; and Carthage, Seguin and Center, Texas, excluding all office clerical employees, guards and supervisors, as defined in the Act.

(v) Refusing to recognize and bargain with the above-named Unions

as the exclusive bargaining representative of their employees in the above-described unit by unilaterally announcing and notifying their employees of intended reductions in personnel and equipment affecting bargaining unit personnel; by unilaterally merging the above-described bargaining unit into a larger group of the Respondents' employees; by unilaterally relocating unit employees and changing their rates of pay, hours of work and other terms and conditions of employment; by unilaterally withdrawing recognition from the Unions as bargaining agent for employees in the above-described unit; by bypassing the Unions and bargaining directly with unit employees; by failing and refusing to fur-

nish the Unions with a complete copy of the Tyson Foods, Inc./Holly Farms Corporation merger agreement; and by constructively discharging their employees who have refused to accept the Respondents' unlawfully changed terms and conditions of employment.

(w) Refusing to recognize and, upon request, bargain with Teamsters Local Union No. 391 as the exclusive bargaining representative of its employees in the following appropriate unit:

> All live haul employees (chicken catching crews) employed at the processing facility of the Respondents located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at the facility of the Respondents located at Roaring River, North Carolina, excluding all office clerical employees, guards

and supervisors as defined in the Act.

(x) Discouraging membership in a labor organization by discharging or constructively discharging, their employees; by issuing written warnings to their employees for engaging in union activities; and by discriminatorily granting pay raises.

(y) Refusing to recognize and bargain with Teamsters Local Union No. 391 as the exclusive bargaining representative of their employees in the appropriate unit described immediately above by announcing to their employees who are members of that unit that the existing pension plan will be unilaterally terminated at a later date; and by unilaterally changing the absentee call-in policy as to when employees, to avoid dis-

charge or discipline, must report their absences to the Respondent.

(z) In any other manner, interfering with, restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Recognize and bargain, upon request, with Teamsters Local Unions Nos. 29, 71, 355, 391, 567, 592 and 988 as the exclusive collective-bargaining representative of its employees in the bargaining unit which includes drivers-yardmen, set forth above, with respect to wages, hours and other terms and conditions of employment and, if an understanding is

reached, embody such understanding in a signed agreement.

(b) Offer Patricia Barker, Raymond K. Huffman, Jr., Alvin Bouchelle, Joseph Richardson and the 47 constructively discharged employees named below, and any employees disciplined under unlawfully changed policies or work rules, immediate reinstatement to their former positions and if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for the discrimination against them in the manner set forth in this decision entitled "The Remedy." The 47 constructively discharged employees entitled to this remedy are:

Earl Howell
Fred Royal
Gene Harris
Danny Osborne
Bill Ray Johnston
Dan Wingler
Ray Kanupp
George Glass
Bryant Welborn
James Spicer
Mike Hamby
Mike Maudlin
Thomas Alexander
Larry Eldreth
Donnie McClary
David Anderson
Butch Miller
Gene Hester
James Sparks
George Barber
Teddy Ray Hayes
Steve Eller
Curtis Eastridge
Donald Doliar
Jerry Fisher
R. J. Absher
Clark McNeil
Earl Eller
Jerry Blackburn
Kenneth Eller
Sam Badgett
Robert Crook
Harden Branscome
Bill St. John
Mike Dancy
Thomas Roope
David Laney
Zane Filipic
Denny Patrick
Romey Nelson

David or Danny Howell
Jerry Mealy
Patrick Owens
Donnie Blackburn
Jerry Miller
Michael Simmons
Mike Staley

(c) Rescind the written warning previously given to James Phillip Church, Gene Hester, Teddy Ray Hayes and Harden Branscome, and remove from its records any reference to the above discharges, constructive discharges, written warnings, and any disciplinary action taken pursuant to unlawfully changed policies or work rules, and notify each affected employee, in writing, that this has been done and that such discharges, constructive discharges, written warnings and/or discipline, and the reasons therefor, shall not be used

as bases for future personnel actions against them.

(d) Upon request, rescind the unilateral changes concerning rates of pay, hours of work, road fees, job benefits and other terms and conditions of employment made on and after September 22, 1989, affecting employees in the above-described unit which include drivers-yardmen, retroactively to September 22, 1989, or whenever such changes became effective, except that employees need not be relocated, and make their unit employees whole, with interest, for any losses sustained due to the Respondents' unlawfully-imposed changes in wage rates, hours of work, road fees, job benefits and other terms and conditions of employment, since the effective

dates of these unlawful changes, in the manner set forth in the section of this Decision entitled "The Remedy."

(e) Furnish, upon request, to the seven above-named locals unions a copy of the merger agreement between Tyson Foods, Inc., and Holly Farms Corporation.

(f) Recognize and bargain, upon request, with Local 391 as the exclusive collective-bargaining representative of their employees in the bargaining unit set forth above, which includes live haul employees, with respect to wages, hours and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(g) Rescind, upon request, the Respondents' announcement that the pension plan in effect for employees in the above-described units would be unilaterally discontinued on or about September 22, 1991, and, if applicable, reinstate the original plan retroactively to its date of discontinuation, making whole any adversely affected employees and, upon request, bargain with the above-named Unions concerning retirement plans.

(h) Upon request, rescind the unilaterally changed absentee call-in policy requiring that, to avoid discharge or other discipline, employees must communicate their absences to the Respondent within 2 days instead of 3 days, as before, and bargain

with the above-named Unions concerning absentee call-in requirements.

(i) Upon unconditional application to return, offer to any employee who participated in the strike commencing October 1, 1989, full and immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without loss of seniority and other rights and privileges, dismissing, if necessary, any person hired as a replacement on or after October 1, 1989. Further, make whole such employees, with interest, for any loss of earnings suffered by reason of the Respondents' refusal, if any, to reinstate them in the manner set forth in the section of this Decision entitled "The Remedy."

(j) Post at all their various facilities, including those in Wilkesboro, Roaring River and Monroe, North Carolina; Harrisonburg, Temperanceville and Glen Allen, Virginia; and Carthage, Seguin and Center, Texas, copies of the attached notice, marked "Appendix."[323] Copies of the notice, on forms provided by the Regional Director for Region 11, after being duly signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous

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[323] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that said notices are not altered, defaced, or covered by any other material.

(k) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps the Respondents have taken to comply herewith.

IT IS ORDERED that the complaints herein be dismissed insofar as they allege violations of the Act not specifically found herein.

IT IS FURTHER ORDERED that the election held on July 27, 1989, in Case 11-RC-5583 hereby is set aside

and that the petition in that matter is dismissed.

Dated, Washington, D.C. March 12, 1992

Robert M. Schwarzbart
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the
United States Government

AFTER A TRIAL IN WHICH WE WERE REPRESENTED BY OUR ATTORNEYS AND IN WHICH ALL SIDES PRESENTED EVIDENCE, IT HAS BEEN FOUND THAT WE HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT IN CERTAIN RESPECTS. TO CORRECT AND REMEDY THESE VIOLATIONS, WE HAVE BEEN DIRECTED TO TAKE CERTAIN ACTIONS AND TO POST THIS NOTICE.

WE WILL NOT refuse to bargain collectively, upon request, with CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNIONS NOS. 29, 71, 355, 391, 567, 592 and 988, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, as the exclusive joint bargaining representative of

our employees in the appropriate bargaining unit described herein, which they represent, concerning wages, hours, and other terms and conditions of employment. The appropriate unit is:

> All driver employees and yardmen employed by Tyson Foods, Inc./Holly Farms Corporation who regularly are dispatched for outhauls through our terminals at Wilkesboro, North Carolina, and Carthage, Texas, and all yardmen employed at our facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Harrisonburg and Temperanceville, Virginia; and Carthage, Seguin and Center, Texas, excluding all office clerical employees, guards and supervisors, as defined in the Act.

WE WILL NOT threaten that the department in which you are employed will be closed should you choose the above-named Unions, or any other labor organization, as your bargaining agent.

WE WILL NOT threaten that, whether or not you choose the above-named labor organizations as your bargaining agent, that we will take away your jobs by selling the trucks that you

drive and by contracting your hauling work to outside carriers.

WE WILL NOT solicit grievances from you and promise, directly or by implication, to adjust them in order to induce you not to select the above-named Unions, or any other labor organization.

WE WILL NOT inform you that it would be futile to join or support the above-named Unions, or any other labor organizations.

WE WILL NOT threaten you with unspecified reprisals for having supported the above-named Unions, or any other labor organization.

WE WILL NOT advise you to stop supporting the above-named Unions in favor of forming a committee to negotiate with our management with respect to wages, hours and other terms and conditions of employment.

WE WILL NOT establish, maintain and enforce a rule which prohibits you from distributing union materials in non-work areas of our premises during non-work hours.

WE WILL NOT threaten you with arrest and WE WILL NOT cause you to be arrested for distributing union materials in non-work areas of our premises during non-work hours.

WE WILL NOT inform you that other employees have been arrested for distributing union materials in non-work areas of the our premises during non-work hours.

WE WILL NOT threaten you with discharge should you distribute union materials in non-work areas of the our premises during non-work hours.

WE WILL NOT establish maintain and enforce a rule which prohibits you from discussing your pay rates with other employees.

WE WILL NOT threaten to retaliate against by assigning you less mileage, thereby lessening your earnings, because you selected the above-named Unions as your bargaining agent.

WE WILL NOT coercively interrogate you concerning your union activities, sympathies and desires.

WE WILL NOT prohibit you from wearing union hats or insignia.

WE WILL NOT threaten you with retaliation for wearing union hats or insignia.

WE WILL NOT discriminatorily prohibit you from posting union materials on our bulletin boards.

WE WILL NOT threaten discharge should you choose the above-named Unions as

your collective-bargaining representative.

WE WILL NOT refuse to recognize and bargain with the above-named Unions as the exclusive collective-bargaining representative of our employees in the above-described appropriate unit by by unilaterally announcing and notifying our employees of intended reductions in personnel and equipment affecting bargaining unit personnel; by unilaterally merging the bargaining unit into a larger group of our employees; by unilaterally relocating unit employees and changing their rates of pay, hours of work and other terms and conditions of employment; by unilaterally withdrawing recognition from the above-named Unions as bargaining agent for the employees in the aforesaid unit; by bypassing the above-named Unions and bargaining directly with unit employees; by failing and refusing to furnish the above-named Unions with a complete copy of the Tyson Foods, Inc./Holly Farms Corporation merger agreement; and by constructively discharging our employees who have refused to accept our unlawfully changed terms and conditions of employment.

WE WILL NOT refuse to bargain collectively, upon request, with CHAUFFEURS, TEAMSTERS, AND HELPERS LOCAL UNION NO. 391, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND

HELPERS OF AMERICA, AFL-CIO, herein LOCAL 391, as the exclusive bargaining representative of our employees in the appropriate bargaining unit herein, which they represent, concerning wages, hours and other terms and conditions of employment. The appropriate unit is:

> All live haul employees (chicken catching crews) employed at our processing facility located at Wilkesboro, North Carolina, and feed haul, feed mill, and service center employees employed at our facility located at Roaring River, North Carolina, excluding all office clerical employees, guards and supervisors, as defined in the Act.

WE WILL NOT threaten that employees who were active for Local 391 will be discharged for their union activities should the employees not choose the Union as their bargaining agent.

WE WILL NOT threaten that our management will know how you voted in a scheduled representation election should you choose LOCAL 391, or any other labor organization, to be your bargaining agent.

WE WILL NOT discourage membership in a labor organization by discharging, or constructively discharging you; by

issuing written warnings to you for engaging in union activities; and by discriminatorily granting you pay raises.

WE WILL NOT refuse to recognize and bargain with LOCAL 391 as the exclusive bargaining representative of the employees in the appropriate unit described immediately above by announcing to our employees who are members of that unit that the existing pension plan will be unilaterally terminated at a later date; and by unilaterally changing the absentee call-in policy as to when our employees, to avoid discharge or discipline, must communicate their absences to us.

WE WILL NOT in any other way, interfere with, restrain or coerce you in the exercise of your under rights under Section 7 of the Act.

WE WILL, upon request, recognize and bargain with TEAMSTERS LOCAL UNIONS NOS. 29, 71, 355, 391, 567, 592 AND 988 as the exclusive collective-bargaining representatives of our employees in the above-described unit which includes drivers-yardmen, and WE WILL, upon request, recognize and bargain with TEAMSTERS LOCAL UNION NO. 391, as the exclusive bargaining representative of our employees in the above-described unit which includes live haul employees, with respect to wages, hours and other terms and conditions of employment and, if

an understanding is reached with respect to either or both units, embody such understanding in a signed agreement or agreements.

WE WILL, upon request, furnish the above-named Unions, in timely fashion a copy of the merger agreement between Tyson Foods, Inc., and Holly Farms Corporation, and any other information which is relevant for purposes of collective bargaining.

WE WILL offer PATRICIA BARKER, RAYMOND K. HUFFMAN, JR., ALVIN BOUCHELLE and JOSEPH RICHARDSON, whom we have unlawfully discharged, and the 47 employees named below, whom we have unlawfully constructively discharged, immediate reinstatement to their former positions, and, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole, with interest, for any loss they may have suffered by reason of our discrimination against them. The 47 employees also entitled to this remedy are:

Earl Howell
Fred Royal
Gene Harris
Danny Osborne
Bill Ray Johnston
Dan Wingler
Ray Kanupp
George Glass
Bryant Welborn

James Spicer
Mike Hamby
Mike Maudlin
Thomas Alexander
Larry Eldreth
Donnie McClary
David Anderson
Butch Miller
Gene Hester
James Sparks
George Barber
Teddy Ray Hayes
Steve Eller
Curtis Eastridge
Donald Dollar
Jerry Fisher
R. J. Absher
Clark McNeil
Earl Eller
Jerry Blackburn
Kenneth Eller
Sam Badgett
Robert Crook
Harden Branscome
Bill St. John
Mike Dancy
Thomas Roope
David Laney
Zane Filipic
Denny Patrick
Romey Nelson
David or Danny Howell
Jerry Mealy
Patrick Owens
Donnie Blackburn
Jerry Miller
Michael Simmons
Mike Staley

WE WILL rescind the discriminatory written warnings previously given to our employees, JAMES PHILLIP CHURCH, GENE HESTER, TEDDY RAY HAYES and HARDEN BRANSCOME.

WE WILL remove from our files any reference to the above discharges, constructive discharges, written disciplinary notice and any disciplinary action taken pursuant to unlawfully changed policies or work rules, and WE WILL notify the affected employees in writing that this has been done and that such evidence of our unlawful conduct will not be used as bases for future personnel actions against them.

WE WILL, upon request, rescind the unilateral changes concerning rates of pay, hours of work, road fees, job benefits and other terms and conditions of employment made on and after September 22, 1989, affecting our employees in the above unit which includes drivers-yardmen, retroactively to September 22, 1989, or to when such changes became effective, except that employees need not be relocated, and WE WILL make our employees whole, with interest, for any losses sustained due to our unlawfully-imposed changes in wage rates, road fees, benefits plans and other terms and conditions of employment, since the effective dates of these unlawful changes.

WE WILL, upon unconditional application to return, offer, to any employee who participated in the strike that began on October 1, 1989, full and immediate reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, without loss of seniority and other rights and privileges, dismissing, if necessary, any person hired as a replacement on or after October 1, 1989, and WE WILL make any such employee whole, with interest, for any loss of earning suffered by reason of our refusal, if any, to provide reinstatement.

WE WILL rescind our announcement that the pension plan in effect for employees in the above-described units as of September 22, 1989, will be unilaterally terminated at a later date and, if applicable, WE WILL reinstate the original pension plan retroactively to the date on which it was discontinued and WE WILL make whole any employees adversely affected by our unlawful unilateral change. WE WILL, upon request, bargain with the above-named Unions concerning retirement plans.

WE WILL, upon request, rescind our unilaterally changed absentee call-in policy requiring that, to avoid discharge or other discipline, you must call us to report your absences within 2 days instead of 3 days, as before, and WE WILL bargain with the

above-named Unions concerning absentee call-in requirements.

TYSON FOODS, INC./HOLLY FARMS CORPORATION
(Employer)

Dated _____

By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 251 North Main Street, Room 447, Winston-Salem, North Carolina 27101-3986, Telephone 919--631-3212.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 9, 1995

No. 93-1710
11-RC-5583
11-CA-13619
11-CA-13520
11-CA-13267
11-CA-13184

HOLLY FARMS CORPORATION; TYSON FOODS, INCORPORATED
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD;
Respondent

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 391, 29, 71, 355, 592, 657, 988, and all affiliated with the International Brotherhood of Teamsters,
Intervenor

No. 93-1882
11-RC-5583
11-CA-13619
11-CA-13520
11-CA-13487
11-CA-13267
11-CA-13184

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

HOLLY FARMS CORPORATION; TYSON FOODS, INCORPORATED;
Respondents

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 391, 29, 71, 355, 592, 657, 988, and all affiliated with the International Brotherhood of Teamsters,
Intervenor

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Petitioners' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 17, 1995

No. 93-1710
11-RC-5583
11-CA-13619
11-CA-13520
11-CA-13267
11-CA-13184

Holly Farms Corp v. NLRB

No. 93-1882
11-RC-5583
11-CA-13619
11-CA-13520
11-CA-13487
11-CA-13267
11-CA-13184

NLRB v. Holly Farms Corp

M A N D A T E

The judgment of this Court dated

3/10/95 takes effect today.

BERT M. MONTAGUE
CLERK

RELEVANT STATUTORY PROVISIONS

1. Section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3), provides:

> The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any

other person who is not an employer as herein defined.

2. Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)-(3).

3. Section 8(a) of National Labor Relations Act, as amended, 29 U.S.C. § 158(a), provides:

(a) It shall be an unfair labor practice for an employer -

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
> ...
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization... .
> ...
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

4. Section 9(a) of the National Labor Relations Act, as amended, 29 U.S.C. § 159(a), provides:

> (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or

other conditions of employment... .

5. Section 3(f) of the Fair Labor Standards Act (hereinafter "FLSA"), 29 U.S.C. § 203(f) (1978) (Addendum G), defines "agriculture" as follows:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 114-1j(g) of Title 12, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.